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Hasniyati bt Hassan & Anor v Kerajaan Malaysia

B HIGH COURT (PULAU PINANG) — SUIT NO PA-21NCvC-8-06 OF 2019
QUAY CHEW SOON JC
14 MARCH 2022

C *Damages — Assessment — Medical negligence — Plaintiffs claimed against defendant for medical negligence — Defendant admitted liability — Quantum of damages to be awarded*

D This was a medical negligence claim by the first plaintiff ('P1') and her son, the second plaintiff ('P2'). The fourth defendant ('D'), the Government of Malaysia, as the owners and managers of Penang Hospital had admitted liability, with damages and costs to be assessed. The claim against the other defendants had been discontinued. P1 presented herself at Pantai Hospital Penang complaining of abdominal discomfort and vaginal discharge. She was E 27 weeks pregnant at that time. However, she was transferred out of Pantai Hospital with a referral letter because there were no beds available in the Neonatal Intensive Care Unit. The doctors at the Penang Hospital did well to undertake an emergency lower segment Caesarean section. P2 was delivered and was taken to the Neonatal Intensive Care Unit in view of his prematurity. F Post-operatively, P1 developed severe bleeding and went into prolonged shock. Her uterus, the right ovary and the right fallopian tube were removed. P2 was born limp with irregular breathing, with bruises over his forehead and upper limbs. He spent most of his time at the Penang Hospital in the Neonatal Intensive Care Unit, during which he suffered from various complications. G This included the auto-amputation of his right arm as a result of complications arising from the insertion of an arterial line at day two of life. P2 was discharged home on day 262 of life. The loss of her reproductive organs and the loss of her son's right arm caused P1 to suffer a psychiatric illness called major (reactive) depressive syndrome. She could not go back to teaching. She was later taken to H see consultant psychiatrist Dr Prem Kumar ('PW1') at the Penang Adventist Hospital. The medical examination by both PW1 and D's expert Dr Siti Nor Aizah bt Ahmad in the year 2020 revealed that P1 was no longer suffering from the depressive syndrome. However both psychiatric doctors opined that there was a risk that the major depressive syndrome could recur in the event any one I of the stressors for P1 reappeared. P2 on the other hand appeared to be faring well with his injuries. Going by his current condition and his prognosis in the future, P2 would benefit from the various types of prosthetic arms, assistive activities-of-daily-living ('ADL') equipment and the treatment and therapies which had been recommended by his expert.

Held:

(1) A global sum of RM300,000 was fair and reasonable as general damages to P1 for pain and suffering and loss of amenities of life. The multiplier to be applied in assessing future general damages should be life expectancy minus current age less 30% for contingencies. The experts on both sides who had examined them did not identify any medical condition which could reduce their life expectancies. Therefore the reduced life expectancy of 70 years proposed by D was not accepted. The multiplier to be applied for P1 was 28 while for P2 was 52. There was a 'risk, chance, danger, likelihood or possibility' of the recurrence of the depressive syndrome for P1 in the future. It would, in the circumstances, be unreasonable not to award her damages to treat her psychiatric injuries in the future. An award based on a yearly consultation would be appropriate (see paras 33–35, 41–42 & 45–46).

(2) A claimant was not expected to behave like a bookkeeper in compiling bills and receipts. The evidence regarding past expenses may be given through documents or the oral testimony of witness. The sum pleaded was reasonable and justifiable. There was no need to achieve arithmetical accuracy when calculating the travel and incidental expenses incurred during the special damages period. The failure to declare and pay income tax does not deter the court from awarding damages for loss of earnings. A deduction of 20% to the loss of earnings to be awarded to P1 so as to take into account the income tax she would have had to pay. A successful litigant was entitled to the costs of pre-action discovery proceedings. Now that the court was made aware of the admitted negligence of D, the costs incurred by P1 to obtain pre-action discovery of the records ought to be allowed as damages. The plaintiffs' advisers would not have been able to give advice on the merits of this action without first studying the medical records. Thus, the costs incurred in obtaining pre-action discovery was a necessary expense and should be reimbursed in full (see paras 52–53, 56, 62 & 64–65).

(3) A global award would be appropriate for the pain and suffering and loss of amenities of life that P2 had suffered and will continue to suffer for the rest of his life with regard to the loss of his arm and the future bone resections. In the circumstances of the case, a global sum of RM350,000 was considered to be fair and reasonable (see para 76).

(4) The opinion of Dr Kavitha ('PW3') was balanced and objective. She had given credible expert evidence supported by sound reasons and by the relevant medical literature. P2 had proven on a balance of probabilities his claim for the various types of prosthetic arms. His needs for the same was reasonable and justified. The award for mechanical arm from age six to ten years was on a one-time basis and a five years life span of upper limb prosthesis was reasonable. The award for bionic and mechanical

prosthetics in respect of age 15 years onwards contemplated a renewal of eight times every five years. Having agreed to the authenticity of the quotations for the bionic prosthetic arm and for the hybrid myo-electric prosthetic arm, D could not now change their stand. The contents of the quotations were proven by the credible evidence of PW3. There was no need for a certified prosthetist and orthotist ('CPO') to be called to testify. The afterthought regarding a need for an electromyography by a CPO was raised by Dr Izmi ('DW2') only in his witness statement in an attempt to challenge PW3's evidence. Next, it would be unfair to rely on a piece of medical literature in 2015 to gauge the sophistication of bionic arms which were available now and which should be available in the future to patients like P2. Lastly, the testimony of DW2 would not be disregarded or treated with caution simply because of his position as a government employed doctor. His duty as an expert was to assist the court in arriving at a just decision and overrode any obligation to the party from whom he had received instructions or by whom he was paid (see paras 85, 87–88, 93–94, 98, 101 & 104).

(5) P2 could not be compelled to seek treatment, therapies and medicines for the rest of his life in the Penang Hospital or any other government hospitals. There were cogent reasons why it was reasonable for P2 to seek private medical treatment, therapies and medicines in the future. Therefore the cost of private medical treatment and therapies to P2 was awarded. A sum of RM62,400 was appropriate for future travel expenses. Without being mathematically precise as to the actual number of trips, this was arrived at based on RM100 per trip on an average yearly basis of 12 trips per year over a multiplier period of 52 years. The medicines recommended by PW3 were not expensive. A global sum of RM5,000 to be awarded as the cost of medication for the future was reasonable (see paras 109, 111, 113, 115 & 117).

(6) The head of damages ie a part time driver that was claimed for the last 15 years of P2's life was not allowed as it was found to be speculative and unnecessary. Once P2 reached legal age for driving he would require car modifications for safe driving. As soon as P2 was fitted with a functional prosthetic arm and with proper therapy, an overuse injury to the remaining arm could be avoided and minimised. Hence, P2 should be able to drive his car independently. The claim for future cost of maids had not been proven on a balance of probabilities. To make a further award for future cost of maids would be unreasonable or excessive. Therefore this claim was not allowed, at least not in full. It would be reasonable to award P2 the cost of maid until he reached adulthood. The claim for future value of care by family members had not been proven on a balance of probabilities. To make a further award for value of care by family members would be unreasonable or excessive. Therefore this claim was not allowed (see paras 128–129, 134–135 & 138).

(7) The sum claimed for cost of maid during the special damages period was reasonable and justifiable and therefore this claim was allowed ie RM23,200. Since the claim was allowed, it would be unreasonable or excessive to also allow value of care by family members on top of that (see paras 142 & 144).

(8) The parents continued to employ a maid to look after P2 during the pre-trial period. He certainly required more care and attention than their other normal children. The monthly sum of RM1,000 which was being incurred should be allowed and therefore a sum of RM33,000 was awarded (see para 147).

(9) Aggravated damages were not warranted in the instant case as: (a) the issue in this suit was purely one of medical negligence; (b) although the issue of liability in this suit had been recorded, it was an unintentional negligence; (c) there was no exceptional or contumelious behaviour or motive on the part of D/Penang Hospital; (d) the injured feeling of P1 due to an insensitive remark by a therapist at the Penang Hospital was not such as to warrant an award for aggravated damages; and (e) there were no elements of aggravating features. The plaintiffs had been fairly compensated by way of general and future damages (see para 149).

[Bahasa Malaysia summary

Ini adalah tuntutan kecuaian perubatan oleh plaintif pertama ('P1') dan anaknya, plaintif kedua ('P2'). Defendan keempat ('D'), Kerajaan Malaysia, sebagai pemilik dan pengurus Hospital Pulau Pinang telah mengaku liabiliti, dengan ganti rugi dan kos yang perlu dinilai. Tuntutan terhadap defendan lain telah dihentikan. P1 hadir ke Hospital Pantai Pulau Pinang dengan mengadu ketidakselesaan perut dan discaj vagina. Dia sedang hamil 27 minggu ketika itu. Walau bagaimanapun, dia dipindahkan keluar dari Hospital Pantai dengan surat rujukan kerana tiada katil disediakan di Unit Rawatan Rapi Neonatal. Doktor di Hospital Pulau Pinang berjaya melakukan pembedahan kecemasan Caesarean segmen bawah. P2 telah dihantar dan dibawa ke Unit Rawatan Rapi Neonatal memandangkan dia tidak cukup matang. Selepas pembedahan, P1 mengalami pendarahan teruk dan mengalami kejutan yang berpanjangan. Rahim, ovari kanan dan tiub fallopio kanannya dikeluarkan. P2 dilahirkan lembik dengan pernafasan tidak teratur, dengan lebam di dahi dan anggota bahagian atas. Dia menghabiskan sebahagian besar masanya di Hospital Pulau Pinang di Unit Rawatan Rapi Neonatal, di mana dia mengalami pelbagai komplikasi. Ini termasuk amputasi automatik lengan kanannya akibat komplikasi yang timbul daripada kemasukan salur arteri pada hari kedua kehidupan. P2 telah dibenarkan pulang pada hari ke-262 kehidupan. Kehilangan organ pembiakan dan kehilangan lengan kanan anaknya menyebabkan P1 mengalami penyakit psikiatri yang dipanggil sindrom kemurungan major (reaktif). Dia tidak boleh kembali mengajar. Dia kemudiannya dibawa berjumpa pakar psikiatri perunding Dr Prem Kumar

('PW1') di Penang Adventist Hospital. Pemeriksaan perubatan oleh kedua-dua PW1 dan pakar D, Dr Siti Nor Aizah bt Ahmad pada tahun 2020 mendedahkan bahawa P1 tidak lagi mengalami sindrom kemurungan. Walau bagaimanapun, kedua-dua doktor psikiatri berpendapat bahawa terdapat risiko sindrom kemurungan utama boleh berulang sekiranya mana-mana satu tekanan untuk P1 muncul semula. P2 sebaliknya kelihatan baik dengan kecederaannya. Berdasarkan keadaan semasa dan prognosisnya pada masa hadapan, P2 akan mendapat manfaat daripada pelbagai jenis lengan prostetik, peralatan aktiviti bantuan kehidupan harian ('ADL') dan rawatan serta terapi yang telah disyorkan oleh pakarnya.

Diputuskan:

(1) Jumlah global RM300,000 adalah adil dan munasabah sebagai ganti rugi am kepada P1 untuk kesakitan dan penderitaan serta kehilangan kemudahan hidup. Pengganda yang akan digunakan dalam menilai ganti rugi am masa hadapan adalah jangka hayat tolak umur semasa kurang 30% untuk kontingensi. Pakar kedua-dua pihak yang telah memeriksa mereka tidak mengenal pasti sebarang keadaan perubatan yang boleh mengurangkan jangka hayat mereka. Oleh itu pengurangan jangka hayat 70 tahun yang dicadangkan oleh D tidak diterima. Pengganda untuk diguna pakai oleh P1 adalah 28 manakala untuk P2 adalah 52. Terdapat 'risiko, peluang, bahaya, kemungkinan atau kebarangkalian' berulangnya sindrom kemurungan untuk P1 pada masa hadapan. Dalam keadaan ini, adalah tidak munasabah untuk tidak memberikan ganti ruginya untuk merawat kecederaan psikiatrinya pada masa hadapan. Award berdasarkan perundingan tahunan adalah sesuai (lihat perenggan 33–35, 41–42 & 45–46).

(2) Pihak yang menuntut tidak dijangka berkelakuan seperti pemegang buku dalam menyusun bil dan resit. Keterangan mengenai perbelanjaan lampau boleh diberikan melalui dokumen atau keterangan lisan saksi. Jumlah yang diplidkan adalah munasabah dan wajar. Tidak perlu mencapai ketepatan aritmetik semasa mengira perjalanan dan perbelanjaan sampingan yang ditanggung semasa tempoh ganti rugi khas. Kegagalan untuk mengisytiharkan dan membayar cukai pendapatan tidak menghalang mahkamah daripada memberikan ganti rugi bagi kehilangan pendapatan. Potongan sebanyak 20% kepada kehilangan pendapatan diberikan kepada P1 untuk mengambil kira cukai pendapatan yang dia perlu bayar. Seorang litigasi yang berjaya berhak menerima kos prosiding penemuan sebelum tindakan. Kini setelah mahkamah dimaklumkan tentang kecuaian D yang diakui, kos yang ditanggung oleh P1 untuk mendapatkan penemuan sebelum tindakan bagi rekod itu sepatutnya dibenarkan sebagai ganti rugi. Penasihat plaintif tidak akan dapat memberi nasihat tentang merit tindakan ini tanpa mengkaji rekod perubatan terlebih dahulu. Oleh itu,

kos yang ditanggung untuk mendapatkan penemuan sebelum tindakan adalah perbelanjaan yang perlu dan harus dibayar balik sepenuhnya (lihat perenggan 52–53, 56, 62 & 64–65).

(3) Award global adalah sesuai untuk kesakitan dan penderitaan dan kehilangan kemudahan kehidupan yang telah dideritai oleh P2 dan akan terus dideritai sepanjang hayatnya berkaitan dengan kehilangan lengannya dan pemotongan tulang pada masa hadapan. Dalam keadaan kes itu, jumlah global RM350,000 dianggap adil dan munasabah (lihat perenggan 76).

(4) Pendapat Dr Kavitha ('PW3') adalah seimbang dan objektif. Beliau telah memberikan bukti pakar yang boleh dipercayai yang disokong oleh alasan yang kukuh dan oleh kesusasteraan perubatan yang berkaitan. P2 telah membuktikan atas imbangan kebarangkalian tuntutannya untuk pelbagai jenis lengan prostetik. Keperluannya untuk perkara yang sama adalah munasabah dan wajar. Award untuk lengan mekanikal dari umur enam hingga sepuluh tahun adalah sekali sahaja dan jangka hayat lima tahun bagi anggota bahagian atas prostesis adalah munasabah. Award untuk prostetik bionik dan mekanikal bagi umur 15 tahun dan seterusnya dicadangkan pembaharuan sebanyak lapan kali setiap lima tahun. Setelah bersetuju dengan ketulenan sebut harga untuk lengan prostetik bionik dan untuk lengan prostetik myo-elektrik hibrid, D kini tidak boleh mengubah pendiriannya. Kandungan sebut harga dibuktikan dengan bukti yang boleh dipercayai oleh PW3. Tidak ada keperluan untuk pakar prostetik dan orthotik berdaftar ('CPO') dipanggil untuk memberi keterangan. Pemikiran kemudian mengenai keperluan untuk elektromiografi oleh CPO dibangkitkan oleh Dr Izmi ('DW2') hanya dalam kenyataan saksinya dalam usaha untuk mencabar keterangan PW3. Seterusnya, adalah tidak adil untuk bergantung pada kesusasteraan perubatan pada tahun 2015 untuk mengukur kecanggihan tangan bionik yang tersedia sekarang dan yang sepatutnya tersedia pada masa hadapan kepada pesakit seperti P2. Akhir sekali, keterangan DW2 tidak akan diabaikan atau dilayan dengan berhati-hati hanya kerana kedudukannya sebagai doktor yang bekerja di kerajaan. Kewajipannya sebagai seorang pakar adalah untuk membantu mahkamah membuat keputusan yang adil dan mengatasi sebarang kewajipan kepada pihak yang memberi arahan kepadanya atau oleh siapa dia dibayar (lihat perenggan 85, 87–88, 93–94, 98, 101 & 104).

(5) P2 tidak boleh dipaksa untuk mendapatkan rawatan, terapi dan ubat-ubatan sepanjang hayatnya di Hospital Pulau Pinang atau mana-mana hospital kerajaan yang lain. Terdapat sebab yang kukuh mengapa adalah munasabah untuk P2 mendapatkan rawatan perubatan swasta, terapi dan ubat-ubatan pada masa hadapan. Oleh itu kos rawatan perubatan swasta dan terapi kepada P2 telah diberikan. Jumlah

RM62,400 adalah sesuai untuk perbelanjaan perjalanan masa hadapan. Tanpa secara tepat tentang bilangan perjalanan sebenar, ini diperoleh berdasarkan RM100 setiap perjalanan pada asas tahunan sebanyak 12 perjalanan setahun dalam tempoh penggandaan selama 52 tahun. Ubat yang disyorkan oleh PW3 tidak mahal. Jumlah global RM5,000 diberikan sebagai kos ubat untuk masa hadapan adalah munasabah (lihat perenggan 109, 111, 113, 115 & 117).

(6) Bahagian ganti rugi iaitu pemandu sambilan yang dituntut selama 15 tahun terakhir hayat P2 tidak dibenarkan kerana ia didapati spekulatif dan tidak diperlukan. Apabila P2 mencapai umur yang sah untuk memandu, dia akan memerlukan pengubahsuaian kereta untuk pemanduan yang selamat. Sebaik sahaja P2 dipasang dengan lengan prostetik yang berfungsi dan dengan terapi yang betul, kecederaan yang berlebihan pada lengan yang tinggal boleh dielakkan dan dikurangkan. Oleh itu, P2 sepatutnya boleh memandu keretanya secara bebas. Tuntutan kos masa hadapan pembantu rumah tidak dibuktikan berdasarkan imbangan kebarangkalian. Untuk membuat award selanjutnya untuk kos pembantu rumah masa hadapan adalah tidak munasabah atau berlebihan. Oleh itu tuntutan ini tidak dibenarkan, sekurang-kurangnya tidak sepenuhnya. Adalah munasabah untuk memberi P2 kos pembantu rumah sehingga dia mencapai usia dewasa. Tuntutan untuk nilai penjagaan masa hadapan oleh ahli keluarga tidak dibuktikan pada imbangan kebarangkalian. Untuk membuat award selanjutnya untuk nilai penjagaan oleh ahli keluarga adalah tidak munasabah atau berlebihan. Oleh itu tuntutan ini tidak dibenarkan (lihat perenggan 128–129, 134–135 & 138).

(7) Jumlah yang dituntut untuk kos pembantu rumah semasa tempoh ganti rugi khas adalah munasabah dan wajar dan oleh itu tuntutan ini dibenarkan iaitu RM23,200. Memandangkan tuntutan itu dibenarkan, adalah tidak munasabah atau berlebihan untuk membenarkan nilai penjagaan oleh ahli keluarga di atas itu (lihat perenggan 142 & 144).

(8) Ibu bapa menggaji pembantu rumah untuk menjaga P2 semasa tempoh sebelum perbicaraan. Dia sememangnya memerlukan penjagaan dan perhatian yang lebih daripada anak normal mereka yang lain. Jumlah bulanan RM1,000 yang ditanggung harus dibenarkan dan oleh itu sejumlah RM33,000 telah diberikan (lihat perenggan 147).

(9) Ganti rugi teruk tidak dibenarkan dalam kes ini kerana: (a) isu dalam saman ini adalah kecuaian perubatan semata-mata; (b) walaupun isu liabiliti dalam saman ini telah direkodkan, ia adalah kecuaian yang tidak disengajakan; (c) tiada tingkah laku atau motif luar biasa atau menghina di pihak D/Hospital Pulau Pinang; (d) perasaan tercedera P1 akibat kenyataan tidak sensitif oleh ahli terapi di Hospital Pulau Pinang bukanlah seperti yang menjamin award untuk ganti rugi teruk; dan

(e) tiada unsur-unsur yang memburukkan. Plaintif telah diberi pampasan yang adil melalui ganti rugi am dan masa hadapan (lihat perenggan 149).]

Cases referred to

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Chai Beng Hock v Sabah Medical Centre Sdn Bhd & Ors [2011] MLJU 1548; [2011] 1 LNS 33, HC (refd)
Chai Yee Chong v Lew Thai [2004] 2 MLJ 465; [2004] 3 AMR 341, CA (refd)
Donnelly v Joyce [1973] 3 All ER 475, CA (refd)
Dr Wan Himratul Azna bt Wan Harun v Dato' Dr Rohan Malek Johan & Ors [2017] 3 MLJ 82; [2017] 1 LNS 11, CA (folld)
Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor [2012] 4 MLJ 260, HC (refd)
How Paik Too v Mohideen [1968] 1 MLJ 51, FC (refd)
Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, FC (folld)
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Muhamad Mustaqim bin Jidin v Mohd Zulfadhli bin Radzali & Ors [2017] MLJU 862, HC (refd)
Muhammad Zulkarnain bin Mohamed Rokani (a child suing through his representative, Mohamed Rokani bin Mokmin) & Ors v Pengarah Hospital Sultan Ismail Johor Bahru & Ors [2021] 8 MLJ 762, HC (refd)
Noorasmawati bt Abu Othman v Kerajaan Malaysia & Ors [2021] MLJU 2439; [2021] 1 LNS 2028, HC (refd)
Norizan bt Abd Rahman v Dr Arthur Samuel [2013] 9 MLJ 385; [2013] 4 CLJ 275, HC (refd)
Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors [2014] MLJU 1922; [2015] 1 CLJ 825, HC (distd)

A *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324, FC (folld)
Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (mendakwa melalui isteri dan wakil litigasinya Wan Zafura bt Wan Kassim) and another appeal [2021] MLJU 2639; [2022] 2 CLJ 173; [2022] 2 MLRA 592, CA (folld)
B *Patch v United Bristol Hospitals Board* [1959] 3 All ER 876, HC (refd)
Pyu Pyu Ma v Dr Lim Soo How & Ors [2019] 11 MLJ 628, HC (refd)
Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals [2017] 4 MLJ 102, CA (folld)
C *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784, CA (folld)
Sheela Christina Nair v Regency Specialist Hospital Sdn Bhd & Ors [2016] MLJU 1899; [2016] 9 CLJ 267, HC (refd)
Tan Cheong Poh & Anor v Teoh Ah Keow [1995] 3 MLJ 89, CA (refd)
D *Tan Jamie v Hasnah Salim and others* (Civil Appeal No T-01(NCvC)(W)-386–10 of 2016), CA (unreported) (refd)
Thompson v Commissioner of Police of the Metropolis [1997] 2 All ER 762, CA (folld)
E *Turkyah Abdul Rahman Assiri v Dr Seri Suniza Suflan & Anor* [2014] 1 LNS 812, HC (refd)
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F *Watson v Cammell Laird & Co (Shipbuilders & Engineers) Ltd* [1959] 2 All ER 757, CA (refd)
Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292, FC (refd)

Legislation referred to

G Evidence Act 1950 ss 123, 162
Rules of Court 2012 O 34 r 2(2)(e), O 40A, O 59 , O 59 rr 8, 16, O 76 r 12
Rules of the Supreme Court 1997 [UK] O 37 rr 7, 8, 9, 10

KB Karthi (with Ravin Veloo) (Vello & Assoc) for the plaintiffs.
H *Rahazlan Affandi bin Abdul Rahim (Senior Federal Counsel, Attorney General's Chambers) for the fourth defendant.*

Quay Chew Soon JC:

INTRODUCTION

I

[1] This is a medical negligence claim by the first plaintiff 'P1' and her son, the second plaintiff ('P2'). P1 and P2 are collectively referred to as the 'plaintiffs'. The fourth defendant ('D'), the Government of Malaysia, as the owners and managers of Penang Hospital had admitted liability on 22 October

2020, with damages and costs to be assessed. The claim against the other defendants have been discontinued. The trial proceeded only on the issue of assessment of damages. The trial was previously part-heard by another judge and then continued before me.

BACKGROUND FACTS

[2] P1 suffered surgical removal of her womb and other reproductive organs. She is unable to have any more children. These injuries caused her to suffer a psychiatric injury which fortunately has now improved. There is common ground between the psychiatric medical witnesses on both sides as regards such injury, her current condition and the future prognosis.

[3] P2 suffered an above-elbow auto-amputation of his right arm at day 52 of life. Similarly, there is common ground as regards his injury and his current condition and the future prognosis. However the type of upper-limb prosthetic arm that he will require in the future is in dispute. There are two types of prosthetic arm available for P2. One is the body-powered (or mechanical) prosthesis and the other is the myo-electric (or bionic) prosthesis. D proposed the mechanical arm. The plaintiffs' expert recommended both, the mechanical arm for the outdoors and the bionic arm for the indoors.

[4] On 1 July 2016 at 3:30pm, P1 presented herself at Pantai Hospital Penang complaining of abdominal discomfort and vaginal discharge. She was 27 weeks pregnant at that time. At 7:30pm on the same day, she was admitted to a ward in Pantai Hospital. However, she was transferred out of Pantai Hospital with a referral letter. The reason given was because there were no beds available in the Neonatal Intensive Care Unit. The referral letter stated: 'advised to go to PGH in view of no ventilator support/lCU backup'. After some delay in communication at Pantai Hospital, P1 arrived at the Penang Hospital at 9:16pm. The doctors at the Penang Hospital did well to undertake an emergency lower segment Caesarean section. P2 was delivered at 9.49pm the same night and was taken to the Neonatal Intensive Care Unit in view of his prematurity.

[5] Post-operatively, P1 developed severe bleeding and went into prolonged shock. The next day, on 2 July 2016 at 5:59pm, she underwent a repeat laparotomy, a total hysterectomy and a right salpingo-oophorectomy. Her uterus, the right ovary and the right fallopian tube were removed. She was then admitted to the Intensive Care Unit for 24-hour observation. The following day, on 3 July 2016, she was transferred out from the Intensive Care Unit to the maternity ward. Two days later, on 5 July 2016, she was discharged home and given an appointment at the Post Natal Clinic on 19 July 2016 (two weeks later).

[6] P2 was born limp with irregular breathing, with bruises over his forehead and upper limbs. He was resuscitated and ventilated by the paediatric team. He suffered two cardiovascular collapses in his first hour of life. He spent 12 days on ventilator support. He went on to spend most of his time at the Penang Hospital in the Neonatal Intensive Care Unit, during which he suffered from various complications. This included the auto-amputation of his right arm as a result of complications arising from the insertion of an arterial line at day two of life. The formation of a block in the artery had caused the death of the tissues in his arm. The arm became gangrenous over time and dropped off by itself some 50 days later. Shortly after the auto-amputation of the right arm, P2 suffered an infection at his stump site. There was discharge of pus from the stump site. An x-ray imaging revealed infection of the bone, known as osteomyelitis. This necessitated the administration of antibiotics. P2 had made a slow recovery from the said infection.

[7] P2 was discharged home on day 262 of life, on 20 March 2017. The auto-amputation of the right arm had posed, amongst others, the debilitating problem of bony overgrowth. This means that the humeral bone at his arm grows faster than his skin. When this happens, he will feel pain at the stump site because the bone will impact his skin. The only remedy is a surgical resection of the bone, which is to be undertaken at least once every two years until he reaches skeletal maturity, meaning when he attains 18 to 21 years of age. He has already undergone three such procedures, in 2016, in 2018 and in 2020.

[8] The loss of her reproductive organs and the loss of her son's right arm caused P1 to suffer a psychiatric illness called major (reactive) depressive syndrome. She had persistent low moods, cried often, did not pay attention to her two older children and kept to herself. She could not go back to teaching. P1 was offered a psychiatric referral to Penang Hospital but declined it. Reason being that she was upset because of the injuries suffered by her and her son at that hospital. And going back to the hospital brought bad memories of her painful experience there. She was later taken to see consultant psychiatrist Dr Prem Kumar (PW1) at the Penang Adventist Hospital.

[9] Dr Prem diagnosed her condition as major depressive syndrome secondary to the injuries suffered by her and her son following his birth. She had unreasonably blamed herself for the injuries suffered by her son. P1 received medical and psychotherapy treatment for six months under Dr Prem. She recovered fairly well from the depressive syndrome and had gone into remission. The medical examination by both Dr Prem and D's expert Dr Siti Nor Aizah bt Ahmad (DW1) in the year 2020 revealed that P1 was no longer suffering from the depressive syndrome. But both psychiatric doctors opined that there was a risk that the major depressive syndrome could recur in the

event any one of the stressors for P1 reappears. The most likely stressor for P1 is the health and well-being of her son.

[10] P2 on the other hand appears to be faring well with his injuries. His parents purchased a cosmetic (non-functioning) prosthetic arm for him in October 2020. Even at a tender age of four years he has shown potential. The loss of the right arm should not deter him from reaching his potential to the fullest. Going by his current condition and his prognosis in the future, P2 will benefit from the various types of prosthetic arms, assistive ADL ('activities-of-daily-living') equipment and the treatment and therapies which have been recommended by his expert.

DECISION

[11] The various items claimed by the plaintiffs, D's proposal in relation thereto, and my award may be summarised as follows:

No	Item	Plaintiffs' claim (RM)	D's proposal (RM)	Court (RM)
A	P1's claim			
A1	General damages for pain and suffering and loss of amenities of life	500,000	260,000	300,000
A2	Future General Damages	14,000	Nil	5,880
A2.1	Multiplier	28 Life expectancy of 78.9 years, less current age (39 years), and less 30% for contingencies	20 Life expectancy of 70 years, less current age (40 years), and less 1/3 for contingencies	28
A3	Special damages			
A3.1	Travel and Incidental expenses	14,300	Nil	14,300
A3.2	Loss of Income	115,200	Nil	115,200
A3.3	Cost of obtaining pre-action discovery	8,480	300	8,480
A4	Aggravated damages	350,000	Nil	No award
Total for P1		1,001,980	260,300	443,860
B	P2's claim			

B1	General Damages for Pain and Suffering and Loss of Amenities of Life	400,000	260,000	350,000
B2	Future General Damages			
B2.1	Multiplier	52 Life expectancy of 78.9 years, less current age (5 years), and less 30% for contingencies	45 Life expectancy of 70 years, less current age (6 years), and less 1/3 for contingencies	52
B2.2	Cost of Prosthetic Arms (including intensive therapies)	4,418,438	55,000	3,950,117
B2.3	Medical and Therapy needs	344,520	Nil	278,430
B2.4	General Damages for Future Pain and Suffering and Loss of Amenities of Life	120,000	Nil	No separate award
B2.5	Travel expenses	169,000	54,000	62,400
B2.6	Medicines	5,000	Nil	5,000
B2.7	Other Assistive Devices and Services	368,000 (28,000 car, 54,000 keyboard, 18,000 ADL aids, 88,000 home appliances, 180,000 part time driver)	45,900 (10,800 car, 13,500 keyboard, 3,600 ADL aids, 18,000 home appliances)	55,000 (16,000 car, 15,000 keyboard, 4,000 ADL aids, 20,000 home appliances)
B2.8	Cost of Maids	924,000	Nil	156,000
B2.9	Value of Care by Family Members	312,000	Nil	No award
B3	Special damages			
B3.1	Cost of Maid	20,200	Nil	23,200
B3.2	Value of Care by Family Members	18,500	Nil	No award

B4	Pre-trial damages			
B4.1	Cost of Prosthetic Arm	9,350	9,350	9,350
B4.2	Cost of Maid	34,000	Nil	33,000
B4.3	Value of Care by Family Members	17,500	Nil	No award
B5	Aggravated damages	200,000	Nil	No award
Total for P2		7,360,508	424,250	4,922,497
Grand Total		8,362,438	684,550	5,366,357

[12] The reasons for my award are explained below. I begin by noting various legal principles pertaining to assessment of damages for a victim of a tort.

Damages not a reward or punishment

[13] It is trite that damages serve as a compensation, not a reward, less still a punishment. In *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885, the Federal Court said at p 10 (MLJ); p 984 (CLJ):

> [20] It is trite that *damages serve as compensation, not a reward less still a punishment* ... In assessing damages, the *court should not be motivated by sympathy* and *award fair compensation based on cogent evidence.* The court should *not descend into a domain of speculation.* The evaluation of those evidence, which form the basis of any risk of future damage, must therefore still be undertaken. And the trial judge can only evaluate such evidence based on the *recognised balance of probabilities standard.*

[14] Damages must be fair, adequate and not excessive. The award of damages is to compensate and not to enrich the claimant. In *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292 at p 293, the Federal Court said:

> It must be remembered that the purpose of damages is to try, so far as humanly possible, to *put the victim back to the position he would have been in but for the accident* The *damages must be fair, adequate and not excessive.* A reasoned judgment must therefore be given by the judge, following legal principles and precedents. *Other awards in other cases should normally be prayed in aid, but consideration must be given where the circumstances differ.*

Once-and-for-all assessment

[15] In the present system of justice in Malaysia, damages will have to be assessed now on a once-and-for-all basis. Once damages are assessed, the plaintiffs cannot return to court to seek more damages for their disabilities and

needs. Thus, I will have to determine their likely needs in the future and provide for them by way of an award of damages now.

[16] In England and Wales provisional damages were introduced by legislation following the criticisms made in *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910 (see O 37 rr 7 to 10 of the Rules of the Supreme Court 1997 of England and Wales. In *Lim Poh Choo*, the House of Lords observed (at p 914):

> The course of the litigation illustrates, with devastating clarity, the insuperable problems implicit in a system of compensation for personal injuries which (unless the parties agree otherwise) can yield only a lump sum assessed by the court at the time of judgment. Sooner or later, and too often later rather than sooner, if the parties do not settle, a court (once liability is admitted or proved) has to make an award of damages, The *award, which covers past, present and future injury and loss, must, under our law, be of a lump sum assessed at the conclusion of the legal process.* The *award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate.* Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering (in many cases the major part of the award) will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low.

[17] The position in Malaysia is the same as it was in England before the introduction of provisional damages by legislation in England. When assessing damages in a brain-damaged infant's claim, the High Court in *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2014] MLJU 1922; [2015] 1 CLJ 825 at p 850 said:

> [83] I will now move on to the issues of the future needs of Nurul Husna. The award of future damages or cost of future care in Malaysia is done on a *once-and-for-all assessment* basis, unlike in England where damages may be assessed periodically, following judgment on liability. Thus, *in Malaysia the victim cannot return to court in the future to claim more damages because his or her injuries have worsened, or if unexpectedly the victim has more needs and the original award had proved inadequate.*
>
> ...
>
> [85] Thus, in making this once and for all assessment, courts are invariably *guided by the opinions of experts* and in this regard the court must see that the expert opinion is reasonable, responsible and respectable; and that it stands up to a logical analysis ... The *future exigencies of the plaintiff's needs are best determined by educated and well-informed surmises and postulations by experts in that field.* The courts have had regard to well established principles in trying to make a reasoned and well-informed award of future damages. The standard of proof regarding future damages is not the balance of probabilities but the possibility of danger of some adverse future developments.

[18] In a once-and-for-all system of assessing damages, the court, with the assistance of the experts, will have to look into the future and evaluate the

plaintiffs' needs arising at that time. The experts would therefore have to opine now regarding the prognosis and future disabilities and needs of the plaintiffs for the rest of their lives. The experts will have to keep in mind the likely possibilities but not fanciful possibilities.

Compensation according to loss and need

[19] The principle for assessing damages for victims of negligence is based on the following. That the loss of the victim is his need resulting from the negligence. And that the amount of that loss is ascertained by reference to the proper and reasonable cost of supplying that need. The aim of damages in negligence is to compensate the victim for his loss. That loss is the existence of a need that would not have existed but for the tort. The computation of that loss in monetary terms for an award of damages is done by reference to the proper and reasonable cost of supplying that need. This principle was set out by the English Court of Appeal in *Donnelly v Joyce* [1973] 3 All ER 475 at pp 479–480:

> We do not agree with the proposition, inherent in counsel for the defendant's submission, that the plaintiff's claim, in circumstances such as the present, is properly to be regarded as being, to use his phrase, in relation to someone else's loss', merely because someone else has provided to, or for the benefit of, the plaintiff — the injured person — the money, or the services to be valued as money, to provide for needs of the plaintiff directly caused by the defendant's wrongdoing. *The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant.* The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. *His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages — for the purpose of the ascertainment of the amount of his loss — is the proper and reasonable cost of supplying those needs.* That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.

[20] The Malaysian courts have followed this principle. In *Liong Thoo v Sawiyah & Ors* [1982] 1 MLJ 286 at p 288, the High Court quoted the following:

> The *defendant's wrong has created a need for the services.* Nursing and attendance are services which can only be provided by an expenditure of effort or money, or both: an estimate must be made of the capital value of such effort and money, past and future, and compensation awarded accordingly. How and on what terms they are provided is not of critical importance: the extent to which they have been, are now, and are likely in the future to be needed is all important, and the court, looking at all the circumstances including the market price of such services, must put a fair value upon them.

[21] In *Tan Cheong Poh & Anor v Teoh Ah Keow* [1995] 3 MLJ 89 at p 102, the Court of Appeal said as follows in regard to computing damages in respect of services gratuitously provided by a parent:

> No doubt the plaintiff's mother has been providing her services free of charge to her handicapped daughter but the *courts have always compensated plaintiffs for the true value of the services that the plaintiff needs, even though it is provided by a parent or other relative.*

Private care v public care

[22] In *Nurul Husna*, the High Court said as follows regarding damages for medical expenses and the provision of healthcare by the government (at pp 837–839 (CLJ)):

> [28] ... It is trite that in a negligence claim, the *court can award damages only in monetary terms* ... The court cannot make an award for any specific relief against the defendants in a tortious claim for damages, for example, to order the tortfeasor to undertake repairs, provide medical treatment, supply goods and services.
>
> [29] I accept the plaintiff's counsel contention that a reduction in the quantum of damages based on the promise from the tortfeasor to provide free medical treatment to the victim of the tort is contrary to legal principle nor would the contractual obligations (arising from the second plaintiff's employment by the first defendant) be a ground to reduce damages. *Nor should damages be reduced by virtue of any statutory duty of the government to provide medical care* to the first plaintiff by virtue of her incapacity.
>
> ...
>
> [31] Likewise, here, the first plaintiff's entitlement to compensatory damages for the negligence of the defendants cannot be reduced or diminished even though the second plaintiff, and the first plaintiff as child and dependent of the second plaintiff, are entitled to free medical care by virtue of the second plaintiff's contract of employment with the government and/or by virtue of the first plaintiff's *status as a disable person ('orang kurang upaya')* who is *afforded free medical care in the government hospitals under the existing policies of the current government.* The contractual rights flowing from the second plaintiff's contract of employment is not permanent and if that contract where to be terminated by any party then the contractual right to free medical care is extinguished, in any event the second plaintiff cannot be curtailed of her right to leave her government employment in the future and be tied down. Likewise, *government policies are not permanent* in nature. The *provision of free medical care in government healthcare facilities for disable persons may change* in the future, as *all government policies are susceptible to change* from time to time.
>
> [32] In Malaysia, the *provision of healthcare by the government is not a matter regulated by statute.* It is a *matter of mere policy.* A public officer who causes loss through his or her unlawful conduct has no right to receive a subsidy from the taxpayer. The victims of negligence caused by a public officer have no statutory right of assistance from the state. These victims would have to institute civil proceedings against the tortfeasors and seek compensation in the form of damages. If the

government is vicariously ordered to pay such damages then it may subject the wrongdoer to a surcharge action under the general orders. That is entirely between the government and the public officer.

[23] D submitted that the plaintiffs can get free healthcare by virtue of P2's 'orang kurang upaya' status. But D did not bring any evidence to show that the government will guarantee free treatment and services in terms of quality, quantity and intensity, to P2, as recommended by the experts. My view is this. There is no legislation compelling the government to provide public healthcare. Neither is the policy of government-funded healthcare cast in stone. When even legislation may be amended, what more mere policy? The victim of a tort should not be subject to uncertainty about the future of his or her treatment and rehabilitation. The issue of resorting to public healthcare is an issue of mitigation of damages. The burden is on the tortfeasor to prove what funding the victim can reliably obtain from the government.

[24] In England, despite the existence of arrangements for care in the NHS (National Health Services) and other services, a claimant can recover the entire cost of private medical treatment. The test is whether the private treatment sought is 'reasonable', not whether it is less expensive. The reasonable option may be the more expensive one. The following extract from the *APIL Guide to Catastrophic Injury Claims* (Grahame Aldous et al, 2nd Ed) is noteworthy:

Paragraph 16.3.5, page 392 (Past medical expenses)

It does not matter whether the claimed medical or hospital expenses could have been avoided had facilities provided by the NHS scheme been used. A claimant is not bound to make use of the medical and hospital facilities of the NHS, and if he or she receives treatment as a private patient at this or her own cost, that expense is recoverable.

Paragraph 16.3.6. page 393-394 (Future medical expenses) The claimant must prove:

(a) the expected and reasonable cost of the medical and hospital services; and

(b) that he or she is likely to make use of private, non-NHS medical treatment in the future.

...

The probable use of private medical treatment in the future will be determined by the pattern of pre-trial use, the expressed intentions of the claimant in his or her evidence with reasons for any private treatment preference, and the expert evidence concerning the non-availability of NHS care.

Paragraph 16.3.7, page 395 (Care, attendance and supervision)

The Court of Appeal held that, when a court was determining whether the claimant in a personal injury action was entitled to recover as damages the cost of proposed private care and accommodation, the *test to be applied was whether the care and accommodation chosen by the claimant was reasonable.*

Paragraph 16.3.13, page 408 (Aids and equipment)

A *As with medical expenses and treatment, it does not matter that the aids or equipment are available free of charge on the NHS, provided the private purchase is deemed reasonable.* This is a particular issue with *prosthetic provision for amputees.* It is not uncommon for a defendant to argue that suitable prosthetics are available on the NHS. However, the reality is that NHS provision is unsuitable in a number of
B respects, including of quality, design, availability, reliability and replacement. It is essential that the expert evidence highlights these problems.

In most catastrophic injury cases, the claimant's reasonable needs will be relatively clear and there will be strong grounds for recovering the private costs of aids and equipment. Instead, the major issue is likely to be the reasonable cost of such items, the number of items required and the reasonable period of replacement.
C

Future damages

[25] In *Inas Faiqah*, the Federal Court decided on two issues which are
D relevant to assessment of damages. Firstly, the Federal Court held that the standard of proof for future damages is on the balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss or damage in the future. The Federal Court said (at p 11 (MLJ)):

[24] ... we are of the view that the *standard of proof with regard to the assessment of*
E *future loss or damage is on the balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss or damage in the future.* From the authorities, one can say that such a lower degree to be attached is best termed by the word 'possibility', 'chance', 'risk', 'danger' or 'likelihood', but regardless of the words used and their semantics, they must also essentially be a substantial one and *not speculative,* and that the *standard of proving such 'possibility', 'chance', 'risk', 'danger' or*
F *'likelihood' of the future damage is still, in our opinion, on a balance of probabilities.*

[26] Secondly, the Federal Court also decided that the decision of the Court of Appeal in *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465; [2004] 3 AMR
G 341 is not applicable in determining a claim for future medical treatment because that case was concerned with past private medical treatment expenses. The Federal Court held that the proper test is reasonableness. The Federal Court said (at p 15 (MLJ)):

[36] In this respect, we are in agreement with the contention of the appellant that
H the case of *Chai Yee Chong* is not relevant to the present case. We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the learned trial judge was in line with the current practice on the strength of the decision in *Chai Yee Chong, which is a case concerning a claim for past private medical treatment. In determining a claim for future medical treatment, be it at a private, or at*
I *a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also show that the amount claimed for such treatment is reasonable.* Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in Gleneagles, evidence was led as to the cost

of rehabilitation care of the first respondent and the costing was obtained from the private hospitals/centres.

QUANTUM OF DAMAGES FOR THE FIRST PLAINTIFF

[27] I turn now to assess the damages claimed by P1.

General damages for pain and suffering and loss of amenities of life

[28] P1 suffered loss of her reproductive organs, post-partum depression, internal bleeding, tissue damage and scarring following a remedial operation to repair the internal bleeding. She blamed herself for the injuries suffered by her son, P2. She developed major depressive syndrome as a reaction to the injuries suffered by the both of them. She had persistent low moods, was no longer able to teach, was no longer interested in caring for her two older children, kept to herself, was constantly in grief and did unusual things to distract herself, like baking all day. She required anti-depressive treatment and psychotherapy for six months before she made some recovery.

[29] The plaintiffs cited the following precedents:

(a) in *Kalpanadevi a/p Karapaya v Dr Hassan bin Mat & Anor* (unreported), Shah Alam High Court Suit No 22–1563–2006, the sealed judgment dated 11 May 2015 (unreported), the plaintiff suffered infection in her abdomen following a negligent operation to remove her appendix. She made partial recovery but was unable to lead an active life. The High Court increased on appeal the award for pain and suffering and loss of amenities of life from RM85,000 to RM200,000;

(b) in *Sheela Christina Nair v Regency Specialist Hospital Sdn Bhd & Ors* [2016] MLJU 1899; [2016] 9 CLJ 267, the plaintiff suffered serious infection and a worsening of her condition following a negligently-performed laparoscopic myomectomy. The plaintiff suffered injuries to her bowel and required the use of colostomy bags. The plaintiff made recovery following a prolonged period of suffering. The High Court awarded RM240,000 for pain and suffering and loss of amenities of life;

(c) in *Pyu Pyu Ma v Dr Lim Soo How & Ors* [2019] 11 MLJ 628, RM250,000 was awarded by the High Court as general damages for pain and suffering and loss of amenities of life for the plaintiff who had suffered a fourth degree perineal tear following delivery which took seven months for the plaintiff to make a recovery;

(d) in *Turkyah Abdul Rahman Assiri v Dr Seri Suniza Suflan & Anor* [2014] 1 LNS 812, the High Court awarded RM280,000 for pain and suffering and loss of amenities of life for the plaintiff who had to undergo a

removal of the uterus as a result of negligent medical treatment; and

(e) in *Muhamad Mustaqim bin Jidin v Mohd Zulfadhli bin Radzali & Ors* [2017] MLJU 862, an Air Force officer was assaulted by his colleague and suffered injuries to his left testicle. He later developed post-traumatic stress disorder ('PTSD') which led to him being on prolonged medical leave. The High Court awarded RM100,000 as general damages for pain and suffering and loss of amenities of life for the injuries suffered, including for the PTSD.

[30] P1 says that the injuries suffered by the claimants in the cases quoted above are not as serious as the injuries suffered by her. None of them had to bear the anguish of dealing with injuries caused to their newborn, at the same time. And none had suffered psychiatric injuries which required treatment and which may recur, as suffered by her. P1 requests a total sum of RM500,000 as general damages for the pain and suffering and the loss of amenities of life suffered and will continue to be suffered by her comprising:

(a) RM400,000 for the loss of her reproductive organs and its sequalae, including the massive bleeding, the unnecessary surgery to remove the organs and the unsightly scars, the inability to conceive again etc; and

(b) RM100,000 for the prolonged psychiatric injuries.

[31] D in turn cited the following precedents:

(a) in *Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor* [2012] 4 MLJ 260, the High Court awarded RM120,000 as general damages for the loss of uterus, inability to conceive, injury and consequent pain and suffering;

(b) in *Norizan bt Abd Rahman v Dr Arthur Samuel* [2013] 9 MLJ 385; [2013] 4 CLJ 275, the High Court awarded: (i) RM120,000 for laporotomy, hysterectomy, the loss of the right ovary, plaintiff's inability to conceive and for the pain and suffering that she had gone through; (ii) RM20,000 for the multiple scars and degloving injury resulting in unsightly tissue and muscle constriction; and (iii) RM80,000 for emotional distress and loss of sexual intimacy. Based on the principle of overlapping, the High Court ordered that 10% be deducted from the total awards; and

(c) in *Jub'il bin Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd* [2001] 6 MLJ 669, the plaintiff was seated next to his wife on a theme park train and witnessed how she was flung out of the train and fell to her death on the ground. Based on the evidence of psychiatric specialists, the plaintiff had recovered and was no longer suffering from any psychological illness. The High Court awarded RM5,000 in respect of

the chronic post traumatic stress disorder previously suffered by the plaintiff. A

[32] Since her depression had fully recovered as affirmed by both psychiatric experts Dr Prem and Dr Siti, D proposed RM10,000 for the past major depressive disorder suffered by P1. D proposed a total sum of RM260,000 for pain and suffering and loss of amenities inclusive of past major depressive disorder suffered by P1. B

[33] In the circumstances of the case, I consider a global sum of *RM300,000* to be fair and reasonable as general damages to P1 for pain and suffering and loss of amenities of life. As sorry as I feel for P1, I cannot be swayed by sympathy alone and the compensation must be fair, adequate and not excessive. C

D

Life expectancy and multiplier

[34] Before assessing future general damages, the multiplier to be used needs to be determined. The multiplier to be applied, in my view, should be life expectancy minus current age less 30% for contingencies. E

[35] D submitted that no documentary evidence was tendered as regards the respective life expectancy of both the plaintiffs during the trial. That is not entirely accurate. The National Statistics Department's Abridged Life Tables, 2018–2020, dated 23 July 2020 ('Abridged Life Tables') was included in the Bundle of Documents filed for the trial. The relevant table on 'Life Expectancy at Birth by State' gives the life expectancy of 78.9 years for a person born in the state of Penang. D complains that the Abridged Life Tables was filed by the plaintiffs on their own without first asking D as to which Part (Part A, B or C) it should be placed and it had never formed part of the Common Agreed Bundle of Documents. Nonetheless, D proposed 70 years as the life expectancy of both the plaintiffs. Both the plaintiffs were born in the state of Penang. The experts on both sides who had examined them did not identify any medical condition which can reduce their life expectancies. I therefore do not accept the reduced life expectancy of 70 years proposed by D. F G H

[36] The Abridged Life Tables is a document published by a governmental body. I can take judicial notice of the same. Furthermore, I consider it to be part of the evidence as it was filed in the Bundle of Documents at the trial. I am guided by the Supreme Court case of *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at pp 706–707 which said: I

> In the absence of any express conditions regarding the inclusion of any of the documents in the agreed bundle of documents, speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows ...
>
> First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling, eg their makers.
>
> Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.
>
> Thirdly, such documents therein do not form automatically a part of the evidence of the case in question ipso facto, but *any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.*
>
> Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, inter alia, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any 'written hearsay' contained therein. The court may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate court for reasons for such refusal.

[37] In calculating the multiplier, D proposed a deduction of 1/3 for contingencies. D referred to the decision of the Court of Appeal in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2015] 3 MLJ 498; [2015] 3 CLJ 153. However, the plaintiffs say that the deduction of 1/3 for contingencies was an agreed point between the parties in that case. The only contention on appeal was whether the court should have given a higher life expectancy of 40 years instead of the 35 years given to the plaintiff by the trial judge.

[38] The 1/3 deduction for contingencies did become a contention in the case of *Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102. The Court of Appeal decided that a 30% deduction should have been made instead of a 1/3 deduction. The Court of Appeal increased the multiplier from 28 to 30 by applying a 30% deduction for contingencies.

[39] Also in a recent decision on 4 February 2022 in *Medi-Circle Sdn Bhd v Nur Zulaikha bt Dzulzaili* (Civil Appeal No W-02(NCvC)(W)-1393–10 of 2020) (unreported), the Court of Appeal applied a 30% deduction when

calculating the multiplier for the plaintiff. The trial judge had applied a deduction of 15%.

[40] The plaintiffs proposed a 15% deduction, alternatively a 30% deduction, for contingencies. I adopt a 30% deduction as applied by the Court of Appeal in *Rohgetana* and recently in *Medi-Circle*.

[41] P1 is 39 years old now. She was born on 16 May 1982. The multiplier to be applied for her is *28*, which is calculated as follows:

(a) life expectancy of 78.9 years;

(b) less current age (39 years) = 39.9 years;

(c) less 30% for contingencies (11.97 years) = 27.93 years; and

(d) multiplier ≈ 28.

[42] P2 is five years old now. He was born on 1 July 2016. The multiplier to be applied for him is *52*, which is calculated as follows:

(a) life expectancy of 78.9 years;

(b) less current age (five years) = 73.9 years;

(c) less 30% for contingencies (22.17 years) = 51.73 years; and

(d) multiplier ≈ 52.

Future general damages

[43] D submitted that P1 is not entitled to the costs of future psychiatrist treatment as she had fully recovered from major depressive disorder. Moreover, it was the evidence of Dr Prem that the latest consultation he had with P1 was on 11 December 2020. And prior to that the last consultation was done in December 2017. There was a gap of three years between those two last periods and during that time, there was no evidence to indicate that P1's depression did recur.

[44] Be that as it may, both Dr Prem and Dr Siti were of the opinion that P1's depressive syndrome was in remission. Any amount of unusual stress can result in the depressive syndrome recurring for P1. These stressors relate mostly to the health and well-being of her son P2. Dr Siti had listed some of these concerns in her expert opinion, which include the high cost of the prosthesis, the inability to get medical insurance coverage for P2, his education and prospects for employment, psychological support for P2, and the repeated bone resections that he has to undergo until the age of 18 to 21 years.

[45] In other words, both treating psychiatrists Dr Prem and the defence expert Dr Siti are on common ground as regards the risk of recurrence of the major depressive syndrome for P1. Following the Federal Court case of *Inas Faiqah*, I am satisfied on a balance of probabilities that there is a 'risk, chance, danger, likelihood or possibility' of the recurrence of the depressive syndrome for P1 in the future. It would, in the circumstances, be unreasonable not to award her damages to treat her psychiatric injuries in the future. Both psychiatrists have also opined that P1 should continue with some form of supportive therapy, without the need to take medicines, so as to keep the depressive syndrome in remission. Dr Prem has opined that regular psychotherapy with a psychologist would help maintain the mental well-being of P1. I see no reason not to accept their expert opinion.

[46] The cost of consultation with a psychologist or counsellor has not been provided for by both the psychiatrists. Dr Kavitha (PW3) had in her expert report given the range of RM170 to RM250 for a single consultation. I adopt a midpoint of RM210. The plaintiffs proposed that P1 be awarded the cost of two consultations a year for the rest of her life. Having regard to the three-year interval between the last two consultations of P1, I think an award based on a yearly consultation would be appropriate. The award for the cost of consultations with a psychologist would therefore be calculated as follows:

RM210 per year x 28 years (multiplier) = RM5,880.

Special damages

[47] The special damages period is from the date of the incident (ie 1 July 2016) until the date of filing of the statement of claim (ie 19 August 2019), a period of approximately 37 months. P1 is pursuing three items of special damages which she had pleaded. They are as follows.

Travel and incidental expenses

[48] A sum of RM14,300 was pleaded for travel and incidental expenses. Which works out to approximately RM386 a month over the 37 months special damages period.

[49] P1 was staying at Seberang Jaya at the material time. Her first two children were born at Pantai Hospital Penang. D says that it was P1's own choice to deliver her children at a hospital situated in the island despite there being several private and government hospitals nearer to her place of residence in the mainland. D contends that under normal circumstances and in whatever situation, those expenses would still need to be incurred by P1 after the birth of

her third child ie P2 irrespective of whether the negligent act occurs or not. They did not flow or arise as a natural or direct consequence of the wrongful act complained of against D. I disagree.

[50] For the first 262 days, almost nine months, of P2's life, P1 and her husband had travelled on a daily basis from their home in Seberang Jaya to the Penang Hospital to visit and care for him. They would also have incurred toll and parking charges when undertaking such travel. They would also have incurred similar expenses for the follow up appointments for P1 after her surgery, including for wound dressings and removal of stitches. Later, P1 also incurred travel expenses for her consultations with her treating psychiatrist Dr Prem at Penang Adventist hospital. The parents would also have incurred travel expenses for P2 to attend to his follow-up appointments and therapy sessions at the Penang Hospital and to get supplies for him. Such travel and medical consultations would not have been needed, but for the injuries suffered by the plaintiffs.

[51] D complains that no documentary evidence was produced to substantiate this claim. But the parents did not and cannot be expected to keep bills and receipts for such expenses. P1 was not in the proper mental state and her husband had to focus on caring for P2 and the rest of the family. P1 testified that she had kept most of the receipts but her maid had disposed of them inadvertently.

[52] I accept that a claimant is not expected to behave like a bookkeeper in compiling bills and receipts. The evidence regarding past expenses may be given through documents or the oral testimony of witness. In *Rohgetana*, the Court of Appeal said (at p 109 (MLJ)):

> [16] ... the defendants persisted before us that only such expenses incurred as could be supported by receipts (documentary proof) ought to be allowed. We however did not find that the learned judge had misdirected himself on the law when he held that *special damages, so long as they were pleaded and particularised, could be proved by oral or documentary evidence* ... Such claims were to be *allowed so long they were within a reasonable sum and justifiable* in the circumstances.

[53] I am satisfied that the sum pleaded is reasonable and justifiable. There is no need to achieve arithmetical accuracy when calculating the travel and incidental expenses incurred during the special damages period. I therefore allow the pleaded sum of *RM14,300* for this item of damages.

Loss of income

[54] P1 testified that she was unable to return to giving home tuition to her students after her traumatic delivery and the injuries suffered by P2. She had

suffered major depressive syndrome which deterred her from carrying out her work and her household duties. She was only able to resume teaching in November 2018 after completing the psychiatric treatment with Dr Prem. Upon return, she was not able to teach at her pre-morbid capacity. As she was no longer able to undertake teaching, she started earning a modest sum from baking cakes and cookies which she would sell to restaurants and shops.

[55] These resulted in P1 suffering loss of earnings. Before the injuries, she used to earn about RM7,000 to RM8,000 per month. For some months after her discharge, she was not able to earn at all. Then she started baking which generated a modest sum. She only started teaching in November 2018 for two small sessions. With the earnings from baking and the reduced students, she could only make about RM2,000 per month. Her loss of earnings is therefore the sum of RM6,000 as pleaded.

[56] P1 admits that she did not declare her income to the Inland Revenue Board and did not pay taxes. However the failure to declare and pay income tax does not deter me from awarding damages for loss of earnings. The courts have awarded damages for loss of earnings in similar instances where the income was not declared. I apply a deduction of 20% to the loss of earnings to be awarded to P1 so as to take into account the income tax she would have had to pay. The Court of Appeal applied a similar deduction when allowing the claimants' appeal in *Vincent Manickam s/o David (suing by himself and as administrator of the estate of Catherine Jeya Sellamah, deceased) & Ors v Dr S Hari Rajah & Anor* [2018] 2 MLJ 497 at p 535 for the loss of earnings/contribution by the deceased patient to her dependents.

[57] I award *RM115,200* to P1 for loss of income calculated at the rate of RM6,000 per month for two years (from August 2016 to August 2018). Which is arrived at as follows:

RM6,000 pm x 24 months less 20% deduction for income tax = RM115,200

[58] D argues that P1's claim for loss of income should be dismissed as she failed to strictly prove such a loss. During cross-examination, D suggested that P1 had never been a home tutor but was a full time housewife, D claims that the purported receipts for tuition fees tendered by P1 (exhs P3 and P4) should be disregarded as they were put under Part C of the Common Bundle of Documents. Further, D claims that the alleged receipts (exhs P3 and P4) were highly dubious and suspicious where most of them were neither signed by the issuer nor stated therein any note as to the reasons for which the payments were made (certain vital columns on the receipts were blank). D invites an inference that those receipts were created purely for the purpose of the trial based on the following:

(a) despite allegedly being issued in the year 2017 and prior to that, the physical books of receipts showed to the court still looked new and were not shabby;

(b) there were seven receipts where there was no signature of acceptance of payments or by the issuer of the receipts;

(c) there were 121 receipts where there was no signature of acceptance of payments or by the issuer of the receipts nor stated therein the reasons for which the payments were made;

(d) there were 13 receipts where there were not stated therein the reasons for which the payments were made; and

(e) the names of the students in the receipts were put in short name (not complete names) (one single word without father's name like 'Isha', 'Irfan') and not in full names.

[59] D complains that none of the so called students or their parents were called to confirm the authenticity and contents of the receipts. Or at least to affirm that they did make payments to P1 for the purported tuition fees and that they did receive the receipts from P2. In rebuttal, the plaintiffs pointed out that D had agreed to the authenticity of the bills and receipts produced by P1, which were marked as exhs P3, P4 and P9. P1 had produced the original receipts of these bills and receipts before the learned senior federal counsel ('SFC') had agreed to reclassify them as Part B documents. The relevant parts of the notes of the evidence are reproduced below:

Examination-in-Chief of PI (PW2)

Q: Puan, sila lihat Ikatan C2, Ikatan Dokumen Bersama Bahagian C Jilid II dan Ikatan C3, Ikatan Dokumen Bersama Bahagian C, Jilid III. Apakah dokumen-dokumen ini, Puan?

A: Untuk Bahagian C Jilid III, ini semua resit-resit saya ketika saya seorang pengajar tuition, home tutor, sebelum tahun 2016

Q: Dan Jilid II, Puan, Ikatan C2, apakah dokumen-dokumen ini?

A: Ini Jilid II, Jilid II sebelum tahun 2016

Q: Puan, siapa yang keluarkan dokumen-dokumen ini?

A: Saya

Q: Dan adakah *salinan asal resit-resit ini ada di hadapan Mahkamah?*

A: Ada

Q: My Lord, can I have the bundles collectively marked, she's the maker of ...

SFC: *No objection to be marked as 'P'* but still subject to cross, Yang Arif

Ct: Of course. Mark as 'P3' and 'P4'

...

Q: My Lord, we have completed PW3, which was my Rehab Expert, Dr Kavitha but we paused the first plaintiff's evidence, so it is for her to continue her evidence. She had not started cross-examination yet. Her Witness Statement has been marked 'WSP1' on the last occasion. I *had introduced some documents which were previously Part C and they were marked.* I had missed out one document, My Lord, the *originals are with my learned friend* and I believe similarly he's not objecting to those documents. *Can I ask for Bundle C to be marked as a exhibit* now?

SFC: *No objection*

Ct: Mark collectively as 'P9'

[60] In the premises, I accept the income documents tendered by P1. I do not believe she cooked up evidence in the form of bills and receipts in order to support her claim for loss of income. She had given an explanation as to why some of the receipts did not carry the signatures, dates, etc. Namely that the receipts were sometimes issued to her students in a rush, and in those instances she may have missed out the date or signature. Even if the income documents are incomplete or imperfect, that alone would not be fatal to the claim. I am guided by a recent decision of the Court of Appeal in *Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (mendakwa melalui isteri dan wakil litigasinya Wan Zafura bt Wan Kassim) and another appeal* [2021] MLJU 2639; [2022] 2 CLJ 173; [2022] 2 MLRA 592 which held that a claim for loss of earnings can succeed in the absence of supporting document, the Court of Appeal said (at p 185 (CLJ); at p 602 (MLRA)):

> [48] There are cases which show that *a loss of earnings can succeed in the absence of supporting documents.* For instance, the Federal Court in *Lim Ah Chi v Tan Ah Mui* [1969] 1 MLJ 215 took judicial notice of the income of a 'pow' seller, the High Court in *Saripah Mahmud lwn Govindaraju Venkatachalm* [2012] 8 MLJ 686; [2011] 1 LNS 828 of a small scale fish and vegetable seller to be RM1,000 and the High Court in *Latifah Che Ngah v Maimunah Zakarla* [2002] 4 MLJ 266; [2002] 4 CLJ 442 to be RM 1,500 for a plasterer. These cases concerned *small income earners where documents will not be easily available.*

Cost of obtaining pre-action discovery

[61] The plaintiffs pleaded a sum of RM8,480 for obtaining medical records. Copies of the medical records of the Penang Hospital were necessary to be perused before an action could be brought. P1 had to apply to court for an order for discovery of their medical records which were kept in the hospitals. P1 had incurred a sum of RM8,480 as the solicitors and client costs for obtaining copies of the medical records. This sum had been incurred but yet to be paid.

[62] I agree that a successful litigant is entitled to the costs of pre-action discovery proceedings. In *Tan Jamie v Hasnah Salim and others* (Civil Appeal No T-01(NCvC)(W)-386–10 of 2016) (unreported), the Court of Appeal vide

an order dated 19 July 2017 awarded a sum of RM7,950 for obtaining medical records.

[63] D says that since an order for discovery of the medical records was granted by the court upon D's agreement, any issue arising out of such documents had become academic. D points to a consent judgment dated 29 May 2017 in Originating Summons No PA-24NCvC-280–04 of 2017 whereby: (a) the plaintiffs shall pay the costs of processing and administrating documents of RM300 to D; and (b) no order as to costs of the originating summons application. D submitted that any award should be confined to an amount of RM300 as envisaged from the said consent judgment.

[64] First, I note that the said sum of RM300 was to be paid by the plaintiffs to D for document processing. Second, at the pre-action stage, the court was unaware and was not called upon to decide as to whether any of the parties were negligent. Therefore, the court at that stage could not possibly order costs against a culpable party. Now that the court in this action is made aware of the admitted negligence of D, the costs incurred by P1 to obtain pre-action discovery of the records ought to be allowed as damages.

[65] The plaintiffs' advisers would not have been able to give advice on the merits of this action without first studying the medical records. Their access to the records was a necessary step to take before bringing a claim in medical negligence. Thus, the costs incurred in obtaining pre-action discovery is a necessary expense and should be reimbursed in full. I award P1 the full sum of *RM8,480* under this head of damages.

QUANTUM OF DAMAGES FOR THE SECOND PLAINTIFF

[66] I turn now to assess the damages claimed by P2.

General damages for pain and suffering and loss of amenities of life

[67] P2 experienced a terrible injury at such a young age. He suffered blanching at the site of the arterial line in his right arm. Which led to him suffering irreversible necrosis of the tissue of his arm, from above the elbow. The necrosis that set in on 5 July 2016 slowly developed into a dry gangrene over a period of about 50 days before the dead part of the hand auto-amputated itself. Shortly after the auto-amputation, the raw area of the skin and tissues at the stump became infected. The infected parts produced pus which was coming out of the stump. This infection necessitated the start of antibiotics on P2. Fortunately, he responded well and the infection settled a few weeks later. This injury however prolonged his stay in the Neonatal Intensive Care Unit.

[68] Then came the next problem — the bony over-growth requiring bone resections. P2's humeral bone at his right arm grows at an accelerated rate as it would for any child his age. However, the auto-amputation had resulted in the skin at the stump growing slower than the bone. Therefore the bone literally grows onto the skin at the stump, protruding and causing pain as it grows. The only remedy is to surgically saw-off the bone as it grows. P1 was subjected to the first of such bone resections within six months of age, in 2016. He has had two further resections in 2018 and also 2020. He will require the bone resection once in every two years. He will likely require such surgeries until he reaches skeletal maturity (when the bone stops growing), which he is expected to reach between the ages 18 and 21. In the months leading to the bone resection, P2 experienced pain at the stump and required the taking of pain killer medications. He is also expected to be on such pain killer medications for some time after each bone resection surgery.

[69] During the examination of P2 by the experts in July 2020, the remaining part of his right arm measured 11cm as opposed to his full left arm measuring 27cm. His growth milestones were near normal albeit some tasks take him more time to complete when compared to a normal child. At this age, there are certain basic ADL (activities-of-daily-living) which he is unable to carry out himself. He requires assistance from others. Some examples are these. He requires assistance to don and doff shirts and pants which have buttons and zips on them. Whilst he is able to defecate on his own in a squatting toilet, he is unable to clean himself once he is done. He has been trained by his parents to use his left hand to feed himself, to undertake drawing of lines and shapes. Only time will tell if he will be able to undertake legible writing using his left hand.

[70] The biggest challenges for P2 are yet to come. He will only encounter them as he grows. His expert Dr Kavitha had addressed some of them which are as follows:

(a) difficulty in undertaking more complex tasks, which will require the use of both hands, such as lifting heavy objects, cutting the nails in his left hand, tying laces, cutting meat, etc;

(b) difficulty in participating in domestic and community ADL, such as social events, sports, hobbies, outdoors, etc;

(c) coping with pain and overuse syndrome, as the remaining good hand is overused to compensate the missing arm and which can result in serious long-term injuries like shoulder impingement, epicondylitis, peripheral nerve entrapment, carpal tunnel syndrome, etc;

(d) difficulty with posture, as the missing arm destabilises balance when undertaking activities like walking, running and which can increase the risk of fall and the risk of chronic imbalance leading to musculoskletal pain in the neck and lower back;

(e) difficulty in securing employment, as the kind of work he can undertake will be severely limited, even if he were to obtain tertiary education;

(f) difficulty with psycho-social development, as he may face issues with body-image and low self esteem when he is exposed to his peers who are able-bodied; and

(g) disability compounded with ageing, as his disabilities would be aggravated by his condition in advanced age which may handicap him or diminish his quality of life.

[71] P1 testified that she is consciously tough on P2 and shows him less love so that he can be a tough person. There are non-medical concerns that the parents have, which are:

(a) risk of P2 being bullied in school and at work place;

(b) difficulty in getting medical insurance coverage because P2 is seen as a 'high-risk client';

(c) difficulty in consoling P2 each time he has to undergo the painful bone resections;

(d) the need for psychological support as P2 grows and becomes more aware of his disabilities; and

(e) the prospects of marriage, of having and raising children.

[72] The plaintiffs cited as precedent the case of *Noorasmawati bt Abu Othman v Kerajaan Malaysia & Ors* [2021] MLJU 2439; [2021] 1 LNS 2028. There the High Court awarded RM260,000 as general damages for pain and suffering and loss of amenities of life to a 40-year old housewife who suffered an above elbow amputation of her right arm following negligent medical treatment. According to the plaintiffs, most of the precedents available for amputation of an arm concern adults who had lost their arm in a motor vehicle injury. So these are claimants who have had the use of their arm for the better part of their adult life and then lost it. Such claimants cannot be compared to P2 who has never had the use of his right arm. Moreover, the pain and anguish of losing an arm in an accident is almost instantaneous — either the arm is severed in the accident or is surgically removed after the accident. That cannot be equated to the pain and suffering P2 would have experienced at the tender age of day four of life and which he continued to feel until the necrosed arm auto-amputated itself on day 52 of his life. And then there is the pain and

suffering caused by the repeated bone resections that P2 will have to endure until he reaches adulthood.

[73] The plaintiffs proposed RM300,000 for the pain and suffering and loss of amenities of life that P2 had suffered and will continue to suffer for the rest of his life with regard to the loss of his arm. In addition, RM100,000 as general damages for the 52 days of necrosis suffered before the auto-amputation and the three stump excision operations which he has so far undergone. The total sum of RM400,000 was requested. The plaintiffs also made a separate claim for general damages for future pain and suffering and loss of amenities of life. In view that P2 will need to undergo eight further bone resection surgeries until he reaches skeletal maturity. The plaintiffs requested a sum of RM15,000 for each surgery. The total sum claimed for this head of damages is RM120,000 (ie RM15,000 per surgery x eight surgeries).

[74] D in turn cited the following precedents:

(a) in *Kow Nan Seng v Nagamah & Ors* [1982] 1 MLJ 128, the Federal Court awarded general damages of RM37,500 for leg amputation;

(b) in *Sheela Christina Nair*, the High Court awarded RM240,000 as general damages for pain and suffering to the plaintiff who had undergone one negligent operation undertaken by the defendant's doctor and two corrective operations;

(c) in *Chai Beng Hock v Sabah Medical Centre Sdn Bhd & Ors* [2011] MLJU 1548; [2011] 1 LNS 33, the High Court awarded RM250,000 for pain and suffering and loss of amenities of life for a total knee replacement surgery that was negligently performed which led to the plaintiff suffering frequent pain at his knee; and

(d) in *Muhammad Zulkarnain bin Mohamed Rokani (a child suing through his representative, Mohamed Rokani bin Mokmin) & Ors v Pengarah Hospital Sultan Ismail Johor Bahru & Ors* [2021] 8 MLJ 762, the High Court awarded RM190,000 for two leg amputations where the plaintiff was just over 12 years old when he had undergone the amputation.

[75] D proposed RM260,000 for the pain and suffering and loss of amenities suffered by P2. D pointed out that P2 will later on be fitted with upper limb prosthesis to improve the appearance, body asymmetry issue for psychological reason and to optimise the ability to perform bimanual tasks. D submitted that any claim for future orthopaedic surgery for bony overgrowth over P2's right stump should not be awarded in view that a certain award will be awarded as damages for pain and suffering for the whole period and to include his future pain and suffering.

[76] I am of the view that a global award would be appropriate for the pain and suffering and loss of amenities of life that P2 had suffered and will continue to suffer for the rest of his life with regard to the loss of his arm and the future bone resections. In the circumstances of the case, I consider a global sum of *RM350,000* to be fair and reasonable. Likewise here, as sorry as I feel for P2, I cannot be swayed by sympathy alone and the compensation must be fair, adequate and not excessive. This item should also be seen in totality in light of the other awards that I am giving to P2.

Cost of prosthetic arms

[77] P2's expert in rehabilitation medicine, Dr Kavitha opined that P2 will benefit from the use of both the mechanical and the bionic prosthetic arms. D's expert Dr Izmi (DW2) was however willing to only recommend the mechanical prosthetic arm. Dr Kavitha explained why P2 should be given both types of the prosthetic arms. The mechanical arm is more superior for use in the outdoors as it is hardy. The bionic arm is more superior for use indoors and for the social setting as it is more functional when carrying out different types of hand movements and its appearance is far more acceptable. It is not that one type of arm is more superior to the other. Both have their advantages and disadvantages and should be used according to the goals intended to achieve.

[78] Dr Kavitha recommended that a bionic prosthetic arm be fitted only when P2 reaches adolescence, the age of 15 years. There are no bionic arms available for children in this country. There are myo-electric arms available for children but functions of the terminal device are limited, which are to open and close only. The mechanical prosthetic arm uses the movement of the shoulders to execute the open and close function of the hook. The only difference between a myo-electric prosthetic arm for children and a mechanical arm for children is that the myo-electric arm uses the hand terminal device whereas the mechanical arm uses the hook terminal device. The mechanical arm, whether for children or adults, has only two types of terminal device. It is either the hook (functional) or the cosmetic hand (non-functional).

[79] Dr Kavitha has also given the option of a hybrid prosthesis, meaning one that uses components from both the mechanical arm and the bionic arm. The hybrid prosthesis will have a mechanical elbow but a bionic hand as the terminal device. The advantage of this is that it will be lighter than a fully bionic prosthetic arm. The disadvantage would be that the metal wires and shoulder straps will still have to be used, making it less comfortable to wear.

[80] Going by the various types of prosthetic arms available, the plaintiffs proposed that P2 be given the following type of prosthetics:

(a) up to the age of six years — the cosmetic (non-functional) arm;

(b) up to the age of ten years — the mechanical arm;

(c) up to the age of 15 years — the hybrid arm (with myo-electric hand); and

(d) from the age of 15 years — the bionic arm and the mechanical arm.

[81] The rationale for the above proposal is this:

(a) up to age of six years — P2 would need to familiarise himself with having a prosthetic arm and the best way to start is by having a cosmetic arm. His parents bought one for him when he was four years old. He should continue wearing it for another two years until the age of six years;

(b) up to the age of ten years — P2 would require some strength to be able to generate movement from his shoulders, for the 'open and close' functions of the hook type of terminal device. From the age of six years he should be able to operate a paediatric-sized mechanical arm until the age of ten years;

(c) up to the age of 15 years — P2 should by then be familiar with the use of the mechanical arm. He should be able to operate a hybrid arm which has a myo-electric hand. The myo-electric hand, which has only the basic 'open and close' function would be a good introduction for P2 to the electric hands; and

(d) from the age of 15 years — with the use of the hybrid arm for the past five years, P2 would now be familiar with the basic functions of the myo-electric hand. Having mastered it, he will then be able to progress into using the bionic hand which can have up to 20 different types of movement of the hand and fingers as opposed to the 'open and close' function in the myo-electric hand. P2 should also be given the mechanical prosthetic arm so as to allow him to undertake outdoor activities. These two types of prosthetic arms should be used by P2 for the rest of his life.

[82] The plaintiffs' claim for the total cost of prosthetic arms for P2, calculated on a multiplier of 52 is as follows:

Age	Type	Cost (RM)	Lifespan and Renewals	Total Cost (RM)
From age 6 to 10 years	Mechanical	11,893	2 years (twice)	23,786
From age 10 to 15 years	Hybrid	226,800	5 years(once)	226,800

From age 15 years onwards	Bionic and Mechanical	444,535 + 11,893 = 456,428	5 years (9 times)	4,107,852
Intensive in-patient therapy		20,000 for each type of prostheses	20,000 @ 3 times	60,000
Grand Total				4,418,438

[83] In addition, Dr Kavitha also recommended an in-patient intensive therapy programme for a month each time P2 receives a new type of prosthetics. This would allow P2 and his carers to be taught on how to use the prosthetics. Dr Kavitha estimated the cost for a one-month intensive therapy admission to be the sum of RM20,000. By the plaintiffs' reckoning, P2 would receive three different types of prosthetics during his lifetime, being the mechanical, the hybrid and the bionic prosthetic arm. The plaintiffs request a total sum of RM60,000 as the cost of in-patient intensive therapy for prosthesis familiarisation.

[84] For the purpose of assessing the costs of body powered prosthesis, D conceded to exh P5 which was tendered through the evidence of Dr Kavitha during examination-in-chief ie, quotation from Teh Lin Prosthetic & Orthopaedic Co Sdn Bhd. The cost is RM11,893 for a 'Complete Set of Above Elbow Mechanical Function Prosthesis'. D proposed: (a) a multiplier of 45; (b) an estimated life span of ten years of the body powered prosthesis sum; and (c) an award of RM55,000 calculated as follows:

RM11,893 x (45 years/10 years) = RM 53,518.50 (rounded to RM55,000)

[85] I am mindful that P2's medical needs are best determined by the relevant experts. In this regard, I accept the opinion of Dr Kavitha which I find to be balanced and objective. She has given credible expert evidence supported by sound reasons and by the relevant medical literature. Although Dr Izmi recommended a mechanical arm only, during cross-examination, he conceded to Dr Kavitha's recommendation as regards the prosthetic arms to be given to P2 in the future, as set out below:

> Q: Doctor, in this case, you had in your report and later in your Witness Statement made this general point, you had referred to various articles, with the medical literatures and said there is a possibility of rejection of myoelectric prosthetic arms in children?
>
> A: Yes
>
> Q: And because of that we should be careful about giving it to pediatric patients?
>
> A: Yes
>
> Q: Now, of course your point also is, *if they are trained and they are able to accept it,*

then they should be able to use the myoelectric arms or the bionic arms, yes?

A: For paediatrics?

Q: No, paediatric only myoelectric, ... [unintelligible] ... For paediatric, only myoelectric, you cannot have a bionic arm because they're too young?

A: I *agree*

Q: *Once they are adults and they fared well with either the body prosthesis, mechanical arm or the myoelectric arm, of course then you can try the bionic arm on them?*

A: Yes, we can try

Q: Doctor, I think in this case there's been some misunderstanding. The plaintiffs case, in fact *Dr Kavitha's opinion is, not that he should not try a body-powered mechanical arm that you are proposing,* yes Doctor?

A: I relate back to my reports. *I only suggest when H develop a good muscle strength, so when he achieve adolescence because to perform shoulder protection and retraction, you should have a reasonable strength to perform it and that's why I suggest later. Same like Dr Kavitha, she also suggested, I would say, a hybrid* but of course she did not specify age.

Q: Yes, in fact in her evidence she said, when he was still a paediatric patient, that means *up to adolescence he should be having first cosmetic and then shift to body-powered mechanical and then when he's an adult and able to use the myoelectric bionic arm, he should be given a bionic arm,*

A: *Correct.*

Q: So we're clear there, Doctor?

A: Clear

Q: *We are not saying that he should not get?*

A: *I agree*

[86] During cross-examination, Dr Izmi also agreed that both the mechanical arm and the bionic arm have their advantages and disadvantages:

Q: Doctor, I take you to your report at pages 67 and 68 of Bundle E. At pages 67 and 68, we've already gone through the medical literature that you had referred to, I don't intend to go through it again, What you had done here, you had spoken about and in fact you had set out parts of the literature that talks about possibility of rejection of myoelectric prosthesis

A; Yes

Q: And really the disadvantages of a myoelectric prosthesis, yes?

A: Yes

Q: You *did not mention a single word about the disadvantages of a body-powered mechanical prosthesis*

A: I did not

Q: You did not because you were recommending it for the future, so you decided not to mention any disadvantages. You had also not made any suggestion about the advantages of myoelectric prosthesis, whether myoelectric or bionic, correct, in your report?

A: Because I did not prescribe ...

Q: No, it's not about prescribing, Doctor, you also didn't prescribe myoelectric prosthesis here but you spoke about the disadvantages, you *did not say a word about the advantages of myoelectric prosthesis,* right?

A: I didn't, I didn't put inside

Q: You also *spoke about the advantages of a body-powered mechanical prosthesis but not about its disadvantages,* correct?

A: Yes

Q: Despite the literature that you had referred to makes both my points, correct? *There are advantages and there are disadvantages for both* and in fact the *rejection rates, whether paediatric or adults, is higher for body-powered mechanical prosthesis when compared to myoelectric,* correct?

A: Yes

Q: Now Doctor, with that, I have to suggest and you can agree or disagree, unfortunately you had come to this Court to give opinion in support of your employers, Ministry of Health, to try and reduce the amount of compensation that is to be paid in this case. That is the sole purpose of your opinion and your presence here. You can agree or disagree with me.

A: I disagree

[87] It is my finding that P2 has proven on a balance of probabilities his claim for the various types of prosthetic arms. I consider his needs for the same to be reasonable and justified. I award the following:

Age	Type	Cost (RM)	Lifespan and Renewals	Total Cost (RM)
From age 6 to 10 years	Mechanical	11,893	5 years (once)	11,893
From age 10 to 15 years	Hybrid	226,800	5 years (once)	226,800
From age 15 years onwards	Bionic and Mechanical	444,535 + 11,893 = 456,428	5 years (8 times)	3,651,424
Intensive in-patient therapy		20,000 for each type of prostheses	20,000 @ 3 times	60,000
Grand Total				3,950,117

[88] My award differs from the plaintiffs' claim in two aspects. First, the award for mechanical arm from age six to ten years is on a one-time basis (instead of twice as claimed by the plaintiffs). D submitted that in the absence of crucial evidence of the Certified Prosthetist and Orthotist (CPO) as to the lifespan of upper limb prosthesis (body powered upper limb prosthesis), an estimated life span of ten years will be reasonable for body-powered prosthesis. I consider a five-years life span to be reasonable, which is in line with the following point. Second, the award for bionic and mechanical prosthetics in respect of age 15 years onwards contemplates a renewal of eight times every five years (instead of nine times as claimed by the plaintiffs). This renewal period is based on a multiplier of 52 years.

The defendant's submission

[89] D submitted that P2 should not be awarded any sum at all for the purchase of a myo-electric or bionic prosthetic arm based on the following:

(a) that the quotations for the myo-electric hybrid arm (exh P6) and the bionic arm (exh P2) are inadmissible because they are Part C documents (authenticity is disputed) and therefore the makers of those documents should have been called to testify on it;

(b) that an electromyography ('EMG') test to be conducted by a certified Prosthetist and Orthotist ('CPO') is a pre-requisite before a myo-electric or bionic arm can be prescribed, but such testing was not carried out on P2; and

(c) that the writers of a high-quality piece of medical literature, Carey et al, 2015 ('Carey literature') had concluded that the available evidence was insufficient to conclude that either a myo-electric or a body-powered prosthesis system provides a significant general advantage over the other.

[90] I agree with the plaintiffs' response:

(a) that the quotations for the hybrid myo-electric prosthetic arm (exh P2) and the bionic prosthetic arm (exh P6) were marked as exhibits during the trial following an agreement from SFC to classify them as Part B documents (authenticity agreed);

(b) that an EMG testing by a CPO is not a pre-requisite for P2 to be prescribed a myo-electric or bionic arm because he has an adequate length of stump left in the amputated arm, consisting of healthy muscles and nerves to operate the said prostheses; and

(c) that the Carey literature (in which the writers had studied literature from the years 1985 to 2013) merely sets out the advantages and disadvantages of both the myo-electric and the mechanical arms and the specific goals intended for both these arms.

The quotations are not Part C documents

[91] The first point of contention made by D is that the quotations for the bionic prosthetic arm (exh P2) and for the hybrid myo-electric prosthetic arm (exh P6) are Part C documents (the authenticity is disputed) and therefore the makers of the documents must be called to testify on them. They say that since the plaintiffs did not call the makers both the quotations are inadmissible. It appears that SFC had overlooked the concession he had made during the trial — that they are to be Part B documents, meaning that the authenticity is not disputed (see O 34 r 2(2)(e) of the Rules of Court 2012).

[92] SFC had, at the start of the trial, placed all the quotations as Part C documents. When these documents were referred to by the witnesses, SFC insisted that they be marked as identified documents ('ID') only. Which led to the court inviting counsel to submit sometime before the conclusion of the trial, as to whether the ID documents can be converted to exhibits. But SFC later agreed that all the quotations be treated as Part B documents and that their markings (initially marked as ID) could now be changed to exhibits. The relevant part of the notes of evidence are reproduced below;

SFC: My Lord, I have *no problem to be marked as P1 and P2* but still subject to my cross-examination

Ct: Of course, I'll always subject to your cross. All she is saying is she went and she got this quotation

P/C: Because the *original document has been tendered* and we received the quotation based on the evidence, so I think shouldn't be any problem to be marked ...

Ct: I mean, she is saying that she ...

P/C: Received the quotation ...

Ct: Yes, it's not like it's totally alien to us. So she does have some personal knowledge of receiving but of course if you want the person who'll say 'This is the quotation I made', then you have to call the maker. It's your right ...

SFC: Yes, Yang Arif ...

P/C: I am most grateful that my learned friend is agreeing ...

Ct: Of course it's subject to cross ...

SFC: Yes, Yang Arif

Ct: Can we convert it?

P/C: Can have it marked as 'P1' and 'P2'

Ct: ID1 mark as *'P1'* and ID2 mark as *'P2'*

...

P/C: Doctor, first would be the quotation that you had received from Teh Lin. Those are found at pages 3 and 4 of Bundle D, Doctor, where did you get this quotation from?

PW3: This was from a company called Teh Lin in Ampang, Kuala Lumpur. I requested a quotation for this child and this is what they emailed to me.

P/C: My Lord, my learned friend had wanted these documents to be in Part C, She had testified to the authenticity of the document. I'm wondering whether my learned friend ...

SFC: I have *no objection for it to be marked* as B, Yang Arif.

P/C: I'm most obliged, My Lord.

Ct: Page 3 of Bundle D mark as *'P5'* and page 4 of Bundle D as *'P6'*

[93] Having agreed to the authenticity of these documents, D cannot now change their stand. Especially when the plaintiffs are not in a position now to call the makers. I find that the contents of the quotations, including P2 and P6, were proven by the credible evidence of Dr Kavitha. She had first given a range of the cost of a hybrid myo-electric prosthetic arm and a bionic prosthetic arm in her expert report. The price range was between RM120,000 and RM220,000 for a Taiwanese make and the range of between RM180,000 and RM280,000 for a German make. She mentioned both her suppliers, LimbTech and Teh Lin, and remarked that the plaintiffs should get a quotation from them. P1 then brought P2 to LimbTech where he was seen by a CPO who prescribed him a cosmetic prosthetic arm, which was purchased for the sum of RM9,350 (exh P1), The CPO from LimbTech also gave a quotation (exh P2) for a German bionic arm. The CPO had remarked in exh P2 that 'another detailed assessment is needed after patient reach age of 15 years'. This is consistent with Dr Kavitha's recommendation, that P2 would need a bionic arm only at the age of 15 years.

[94] For the Taiwanese hybrid myo-electric prosthetic arm and the mechanical arm, Dr Kavitha herself obtained the quotation from Teh Lin, which quotations were marked as exhs P6 and P5 respectively. The quotations were merely to support the evidence of Dr Kavitha on the cost of the different types of prosthesis. The quotations obtained were consistent with the price range given by Dr Kavitha in her report. There was no need for a CPO from either LimbTech and Teh Lin to be called to testify. They had merely given quotations on the costs of the prostheses, which costs were consistent with Dr Kavitha's estimates. It would be different if D had procured cost estimates of these types of prosthesis and those estimates were markedly lower than the estimates provided by Dr Kavitha. Then there may have been a need to call the CPO's, However, D did not procure any cost estimates.

[95] In any event, Dr Izmi agreed in cross-examination that rehabilitation medicine physicians like Dr Kavitha and him are well-versed with the provision of prosthetic arms, as set out below:

Q: And you had given the components that's required. Now Doctor, I'll say this, going by your experience in dealing with amputee patients, you will be familiar with these components, yes Doctor?

A: Yes

Q: You don't have to be a certified CPO to say what these components are, yes?

A: Yes

Q: So just like you, Doctor, Dr Kavitha too is trained and experienced in identifying these components, yes?

A: Correct

Q: Because I thought it came from you, Doctor, Dr Kavitha was cross-examined to say that since you're not a certified CPO, you cannot be recommending these items, these components, you should not give evidence regarding this, a certified CPO should come, so that's why I'm asking you, Doctor, You are a *Rehab Physician with experience in dealing with amputee cases, surely you will know what are these components and what is needed,* correct?

A: Yes

EMG testing by a CPO not a prerequisite

[96] D contends that EMG testing by a CPO is a pre-requisite before a myo-electric or a bionic prosthetic arm can be prescribed to P2. In support of this contention, D relied on some parts of the evidence of Dr Kavitha and Dr Izmi. However for proper context, the other relevant parts of their respective evidence also need to be looked at. Dr Kavitha testified that an EMG testing by a CPO will be conducted only at the time of prescribing and fitting of a myo-electric or bionic prosthetic arm. However, she did not see a need for it to be done for P2 because he had a good length of stump left in his amputated arm and also because the muscles and nerves in that arm are healthy. She was confident that P2, when he grows into adolescence, will be able to be fitted with a myo-electric or bionic arm. The EMG testing by a CPO would become a pre-requisite ifunhealthy the patient has an extremely short stump left in his or her amputated arm or if the muscles and nerves in the affected arm is. To demonstrate this point, Dr Kavitha played a video recording of one of her patients who had an extremely short stump left in her amputated arm which led to the patient having significant limitations in her shoulder movements. Dr Kavitha was concerned that the patient in the video record may possibly not have adequate muscles and nerves left to generate electric signals to operate the bionic arm, But happily even that patient was able to operate the bionic arm, despite having a very short stump, as can be seen in the video.

[97] Both Dr Kavitha and Dr Izmi have on examination found P2 to have a good length of stump left in his affected arm. They also found him to have no limitations in the movement of his shoulders. And most importantly, they did

not find the muscles and nerves in the affected arm to be unhealthy or inadequate. Dr Kavitha's specific evidence regarding P2's ability to operate a myo-electric or bionic arm during cross-examination, as reproduced below, has remain unrebutted:

Q: Doctor, am I right to say that EMG is a diagnostic procedure that evaluate the health condition of muscle and the nerve cell that control them?

A: That is a clinical EMG whereas what they would do in a prosthetic setting is from, like I think it was the fourth video that you showed, and that is testing. So you can just put the EMG electrodes over different muscles and see which the patient is able to do well. That's myo-prosthesis testing and that's what we would do here

Q: Doctor, do you agree, for the purpose of myoelectric prosthesis without EMG test being done, we cannot determine whether an amputee is having unhealthy condition of muscle and nerve cell?

A: I disagree

Q: I put it to you, Doctor, it is therefore pre-requisite for an amputee to be subjected to EMG test before suggestion can be made for him for to be fitted with a myoelectric prosthesis, agree or disagree?

A: I disagree

Q: Doctor, did you personally *conduct EMG test on H*

A: No, I *didn't because it's not necessary.* I believe the one you're talking about, a clinical EMG which we use when someone has muscle dystrophy or muscle diseases, that's a clinical EMG but that is not required for prosthetic prescriptions. What we do is simply what was shown in the video where we actually put the electrodes over a muscle and test to see if it can move a prosthesis functionally well or not

Re-Examination of Dr Kavitha (PW3)

Q: Now, Doctor, I'll come to the next point about clinical EMG and EMG for the purposes of prosthesis, you had explained the difference. Now, I would like to ask you this, Doctor, In the last video that was shown yesterday which was marked as P7D, that was one of your patients, could you explain what was being done there?

A: So that was testing the patient. So we *apply the electrodes to different muscles of the patient and we get the patient to then sort of simulate the movement to see how well the patient is able to control the bionic hand because it's true, the patient doesn't have the muscle ability to do that, you wouldn't want to prescribe a prosthesis*. And that particular patient, *I wanted her tested because she had a very short stump and she had a lot of contractures, so she didn't have good range of movement but she was able to use it and that's usually how patients are tested before being fitted*. Clinical EMG is what the neurologist will do to test for muscle diseases and it's usually when there are problems with the nerves. There really is *no reason why H should have any problems with his nerves* and testing the nerves can be quite painful because sometimes you are giving them little electric shocks to see how the current flows and there's no reason to put a child through that.

Q: Now Doctor, going by your *assessment of H, do you see any reason why he will not be a suitable candidate for a bionic arm or a myoelectric arm?*

A: No, there's *no reason* I can see that why he should not be able to use it

[98] Both in his report and in his witness statement, Dr Izmi stated that there were no neurological deficits in P2's remaining stump in his amputated arm and that there was full range of movements of P2's shoulders. Having conceded to that point, Dr Izmi tried to disagree with Dr Kavitha's recommendation for a bionic arm by raising, belatedly, this point regarding an EMG testing being a prerequisite, This afterthought regarding a need for an EMG by a CPO was raised by Dr Izmi only in his witness statement in an attempt to challenge Dr Kavitha's evidence. This point was not mentioned at all in his expert report filed before trial. It seems to me that if Dr Izmi had any doubt regarding P2's ability to operate a myo-electric or a bionic arm, he should have asked for an EMG test to be undertaken on P2. Dr Izmi was challenged on this point and he had no satisfactory answer to the same. His evidence on this point during cross-examination is reproduced below:

Q; Doctor, you also know that, as you have given the answer in page 32 of your witness statement, Q&A17, if H were to accept a myoelectric prosthesis, he should undergo an EMG testing by a prosthetist, a CPO, correct, to see whether he will be able to take it or not?

A: Actually it's written in the literature and manufacturer guidelines ...

Q: Yes, Doctor, I'm agreeing with you, yes. So your point is, he will need it?

A: Yes

Q: Did you order one?

A: I didn't because I did not actually recommend any myoelectric prosthesis ...

Q: So you decided he doesn't need it ...

A: Tak perlu lah

Q: Tak perlu, so you decided not to test it ...

A: Tak perlu, do things smartly

Q: Not your concern, Doctor? I would like to say that that is why you're not an independent witness, it is not your concern about money, that is for His Lordship to decide ...

A: Okay, that ...

Q: Doctor, you don't have to answer

A: That is your interpretation, I'm not going to argue

Carey literature

[99] D placed heavy reliance on the Carey literature to support their contention that there is insufficient evidence to conclude that one type of prosthetic arm is significantly more advantageous than the other. But I do not see how such contention would deter me from awarding damages for a

myo-electric or bionic arm to P2. The plaintiffs' claim, as supported by Dr Kavitha, is for P2 to gradually move from a cosmetic prosthetic arm (which he has now) to a mechanical arm and then to a hybrid myo-electric arm and finally to the bionic arm. In adulthood P2 would need to use both the bionic arm and the mechanical arm but each of them is to undertake different activities. One for indoor and social interactions and the other for the outdoors and hardy activities. It was never the plaintiffs' case that the bionic arm is superior to the mechanical arm. In fact, this point was raised with Dr Izmi during his cross-examination and he had agreed with Dr Kavitha's recommendations (as referred to earlier).

[100] The Carey literature had in fact set out the importance of having both the bionic prosthetic arm and the mechanical arm, suited for the different types of activities to be undertaken, as quoted below:

> Page 13 — Currently, *evidence is insufficient to conclude that either system provides a significant general advantage. Prosthetic selection should be based on a patient's individual needs and include personal preferences, prosthetic experiences, and functional needs*;
>
> Page 22 — *Body-Powered Upper-Limb Prostheses* ...
>
> Although not specifically reported in literature, these additional gross body movements coupled with the need to utilize the same activation force regardless of task *may lead to bodily injury over time*;
>
> Page 24 — Reasons cited for *higher rejection rate of BP systems* with a hand TDs include slower movement, poor grasp force, increased mass, and energy expense for operation ... Despite the considerable differences in BP TDs, *BP prostheses are generally associated with user complaints* including increased wearing temperature, clothing damage, poor cosmesls and harness maintenance issues.
>
> Page 23 — *Myoelectric Powered Upper-Limb Prostheses* ... Other studies show that *users concerned with cosmesis prefer MYO prosthesis* ... highest percentage of persons with MYO systems used their prosthesis in social situations more than users of BP and passive cosmetic systems ... *MYO prosthesis users also reportedly have improved psychosocial and social adaptation compared BP users*, likely because of aesthetic design of MYO prosthesis, which have greater resemblance to an anatomical upper limb, Also from a cosmetic perspective, BP prostheses include harness suspension systems with cable controls that can be visible through and damaging to the user's clothing in addition to irritating the axilla.
>
> Page 24 — Although not mentioned In the literature, *users may prefer MYO prostheses in the near future with improvements in the shape and articulations of prosthetic hands as well as improved connections* to the neuromusculoskeletal networks. The *use of MYO prosthesis may also provide an exercise regimen for overall upper-limb health overtime*.

[101] The Carey literature reviewed medical literature on the type of mechanical and bionic prosthetic arms ranging from the years 1985 to 2013.

Dr Izmi agreed that the bionic arms have improved over the last five years. Therefore it will be unfair to rely on the 2015 Carey literature to gauge the sophistication of bionic arms which are available now and which should be available in the future to patients like P2.

[102] Dr Izmi recommended that P2 should be prescribed a mechanical prosthetic arm instead of a myo-electric arm because of the substantial rejection rates among children in the use of myo-electric prosthetic hands. However, according to the Carey literature, there is a higher rejection rate for mechanical prosthetic arms when compared to myo-electric arms. If rejection rates should determine the type of prosthesis to be prescribed, then it is the myo-electric arm which should be prescribed, simply because it has a significantly lower rejection rate when compared to the mechanical arm. The relevant parts of the notes of evidence of the cross-examination of Dr Izmi are reproduced below:

> Q: Doctor, in this case, you had in your report and later in your Witness Statement made this general point, you had referred to various articles, with the medical literatures and said there is a possibility of rejection of myoelectric prosthetic arms in children?
>
> A: Yes
>
> ...
>
> Q: Let's stick to this first. *Mean rejection for body-powered is higher than myoelectric,* correct? 45%, 35%, myoelectric is lower.
>
> A: Okay
>
> Q: Then, for adult populations, both are significantly lower. So the moment they're adults, less rejection, correct Doctor? 26% and 23%, *myoelectric rejection is still lower,* correct?
>
> A: Okay, yes

Expert witness

[103] It would be opportune at this juncture to discuss the plaintiffs' grievance with Dr Izmi, the in-house rehabilitation medicine expert for D, as Dr Izmi is a Ministry of Health-employed doctor, the plaintiffs argue that he is unable to give an expert opinion against the Ministry. The plaintiffs contend that Dr Izmi is a conflicted witness because the objective of his employer, the Ministry, is to see that quantum is as low as possible. That cannot sit well with the duty expected of him by the court, which is to determine what equipment, care, treatment and therapy should P2 receive which could put him in a position he would have been in if not for the injuries suffered, citing the Malaysian 'Medical Council Guidelines of Expert Witness', the plaintiffs claim that Dr Izmi failed to qualify as an independent and objective expert. They assert that for all intents and purposes, Dr Izmi was a treating doctor because he

A was responsible for the treatment and management given to P2 in the Penang Hospital at all material times. He was the then head of its rehabilitation medicine department. His subordinate officers had attended to P2.

B **[104]** I would not disregard the testimony of Dr Izmi or treat it with caution simply because of his position as a government employed doctor. Dr Izmi understands that he is giving evidence pursuant to O 40A of the Rules of Court 2012. This means that his duty as an expert is to assist the court in arriving at a just decision. This duty overrides any obligation to the party from whom he has received instructions or by whom he is paid. I prefer to scrutinise his C testimony objectively and decide what weight to give to it.

[105] I accept that at the material time, when Dr Izmi was at the Penang Hospital, he was not a treating doctor of P2. During cross-examination, Dr D Izmi testified that the treatment and management of P2 was not handled by him but by other specialist, Dr Zeti and the medical officer Dr Najihah. Before being transferred to Cheras Rehabilitation Hospital, Dr Izmi's role at the Penang Hospital had nothing to do with his duty of giving opinion of what types of functional prosthesis (mechanical body powered or E myo-electric/bionic hand) that best suits P2 in future as required in this case. His role in the Penang Hospital at that time was purely administrative as the Head of Rehabilitation Medicine Department. He attended a family conference with the parents of P2 in that capacity. It was therefore not material to the present assessment of damages.

F

[106] Both Dr Kavitha and Dr Izmi agree that based on their examination, despite the amputee status, P2 was observed to be a functionally active boy and when suitable he could be fitted with the suitable functional prosthesis. In essence, for the purpose of assessment of damages, the crux of the expert G medical reports of the Rehabilitation Medicine Physicians from both sides are as follows: (a) the types of prosthesis that best suit P2 now and in future; (b) the proposed future rehabilitations protocol for P2; (c) the care, treatment and rehabilitation P2 is likely to require now and in future; and (d) assistive device and equipment P2 will require now and in the future.

H

[107] The Court of Appeal case of *Dr Wan Himratul Azna bt Wan Harun v Dato' Dr Rohan Malek Johan & Ors* [2017] 3 MLJ 82; [2017] 1 LNS 11 is instructive. The plaintiff there argued that the testimonies of the defence's own witnesses and expert ought to have been treated with caution since these I witnesses were from government hospitals and also colleagues of the first and third respondents. In dismissing the plaintiff's appeal and affirming the decision of the court below, the Court of Appeal said:

> [55] Finally as regards the treatment of the testimonies of the respective expert witnesses, there was no indication that the learned trial judge had not critically

considered them or that Her Ladyship wholly only accepted the opinion expressed by DW4 and DW6 for the defendants. To the contrary, as can be seen, the learned trial judge had even rejected, with reasons provided, the view put forward by DW6 for the defendants that there were two different strictures that arose over time rather than the same recurring stricture in the treatment underwent by the plaintiff (see paras 41–43 of the judgment). It was not as if the learned trial judge had accepted all of the defendants' expert witnesses' testimony — 'hook, line and sinker', as they say.

[56] The learned trial judge went on then to state at para 44 of the judgment as follows:

> [44] On the point raised by the learned counsel for the plaintiff regarding the independence of the defendants' expert witnesses, namely DW4 and DW6, suffice it to say that *there is no reason to doubt their independence merely because they are government consultants and that they knew the first and third defendants. As it is with any expert witnesses, this court will take their opinion pure as a guide and I have given the necessary weight to the evidence based on the circumstances of the case*

We found that the *approach taken by the learned judge was correct* and could not be faulted in the circumstances.

Medical and therapy needs

[108] Dr Kavitha's recommendations for this head of damages are as follows:

No	Services	Estimated Costs (RM)	Frequency	Total (RM)
1	Medical consultation (Rehabilitation Physician, Orthopedic Surgeon, Prosthetic technician)	80–235/visit	5–7 visits per year (235 x 5 x 52)	61,100
2	Psychologist/ Counsellor	100–250/visit	3–6 sessions x 2 (250 x 6 x 2)	3,000
3	Occupational Therapy	100–170/visit	Weekly for six months than monthly maintenance (170 x 4 x 6) + (170 x 616) = 109,140 +	133,620

			weekly sessions, need to be repeated for three months when prosthesis is changed (total of 12 prosthesis) (170 x 4 x 3 x 12) = 24,480	
4	Physiotherapy	100–170/visit	Monthly for upper limb strengthening (170 x 12 x 52)	106,080
5	Surgery for stump over growth	5,000	2 yearly fill age 18–21 (5,000 x 8)	40,000
Grand Total				344,520

[109] D did not dispute the need for such therapies or its frequency, they did not challenge Dr Kavitha as regards the cost of each of the items of private medical treatment, therapies and medicines which she had recommended. Their only point was simply that all these therapies are available for free at the Penang Hospital. D submitted that P2 should not get a single cent as damages because all the medical treatment, therapies and medicines that he will need in the future can be obtained for free at government hospitals. However, I cannot compel P2 to seek treatment, therapies and medicines for the rest of his life in the Penang Hospital or any other government hospitals because:

(a) damages can be awarded only in monetary terms;

(b) it is not possible for me to make an order, which can properly and conveniently be enforced, by which the government is to provide treatment and therapies at the recommended intensity and frequency, and for free;

(c) it would be difficult to supervise the performance of such an order;

(d) non-performance or unsatisfactory performance of the order would lead to the plaintiffs seeking damages and therefore lead to continuing litigation; and

(e) the government's policies for free medical treatment and therapies are not cast in stone and may change at any time.

[110] In *Inas Faiqah*, the Federal Court said (at p 15):

[36] *In determining a claim for future medical treatment, be it at a private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also show that the amount claimed for such treatment is reasonable.* Of course, this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in Gleneagles, evidence was led as to the cost of rehabilitation care of the first respondent and the costing was obtained from the private hospitals/centres.

[111] The question is whether it is reasonable for P2 to seek private medical treatment, therapies and medicines in the future and whether there is evidence in support of such a position. It is my finding that there are cogent reasons why it is reasonable for P2 to seek private medical treatment, therapies and medicines in the future. Namely:

(a) Dr Kavitha's unchallenged evidence that the public sector hospitals are overburdened with patients which deters them from giving treatment and therapies at the required intensity and frequency to P2;

(b) the public sector hospitals have budget constraints, especially for the provision of upper limp amputee services;

(c) the Penang Hospital did not purchase a cosmetic prosthetic arm, which is the cheapest type of the prosthetic arm available (which the parents bought for RM9,350) for P2. Although D explained that it was more a case of certain formalities needing to be followed rather than a lack of budget;

(d) P1, going by her psychiatric condition and her bad experience at the Penang Hospital, is unwilling to bring P2 there for treatment and therapies;

(e) the defence psychiatric expert (Dr Siti) found the refusal by P1 to receive treatment and therapies again at Penang Hospital as an acceptable reaction;

(f) the insensitive remark made by an occupational therapist (ie that P2 'is slow, cannot do this, cannot do that') had discouraged P1 from bringing P2 back for therapy; and

(g) Dr Izmi, as the head of the rehabilitation department at the material time accepted that such a remark, if it was made, should not have been made.

[112] In *Rohgetana*, the Court of Appeal allowed the full cost of private treatment and therapies to the infant claimant against the government. The learned trial judge in that case allowed the cost of private treatment but made

a 1/3 deduction. The Court of Appeal applied the judgment of the Federal Court in *Inas Faiqah*, when holding that the deduction was wrong. It was also held that it was reasonable for the infant plaintiff in that case to receive private medical treatment and therapies instead. The test is whether it was 'reasonable' for the claimant to seek private medical care.

[113] In light of the above, I find that it is reasonable for P2 to seek private medical treatment and therapies in the future. I therefore award the cost of private medical treatment and therapies to P2 as set out below. My award differs from the plaintiffs' claim in that I adopted a midpoint in relation to the estimated costs and the frequency:

No	Services	Estimated Costs (RM)	Frequency	Total (RM)
1	Medical consultation (Rehabilitation Physician, Orthopedic Surgeon, Prosthetic technician)	B0-235/visit	5–7 visits per year (160 x 6 x 52)	49,920
2	Psychologist/ Counsellor	100–250/visit	3–6 sessions x 2 (175 x 4 x 2)	1,400
3	Occupational Therapy	100–170/visit	Weekly for six months than monthly maintenance (135 x 4 x 6) + (135 x 618 [ie 51.5 years]) = 86,670 + weekly sessions, need to be repeated for three months when prosthesis is changed (total of ten prosthesis) (135 x 4 x 3 x 10) = 16,200	102,870

4	Physiotherapy	100–170/visit	Monthly for upper limb strengthening (135 x 12 x 52)	84,240
5	Surgery for stump over growth	5,000	two yearly till age 18–21 (5,000 x 8)	40,000
Grand Total				278,430

Future travel expenses

[114] P2 will incur travel expenses so as to attend the various treatment and therapies recommended above. As he currently lives in Seberang Jaya, he will need to travel to the Penang Island to attend to such treatment and therapies. The plaintiffs claim that P2 will need to make about 1,690 trips to attend to the medical and surgical consultations and the occupational and physiotherapies. But I note that this figure was based on the initial proposed multiplier period of 63 years. A sum of RM100 per trip is proposed which would in total be the sum of RM169,000.

[115] D proposed a sum of RM54,000. Which is arrived at based on RM100 per trip on an average yearly basis of 12 trips per year during a multiplier period of 45 years. I consider a sum of *RM62,400* to be appropriate. Without being mathematically precise as to the actual number of trips, this is arrived at based on RM100 per trip on an average yearly basis of 12 trips per year over a multiplier period of 52 years. I note that some of the trips could overlap, in the sense that P2 may receive more than one type of treatment or therapy during the same trip.

Medicines

[116] Dr Kavitha recommended the medications quoted below to be taken as and when needed by P2 in the future. It is difficult to predict how often P2 would experience pain and how often he would need to take the pain killer and anti-inflammatory medications for the next 52 years to come:

Medicines	Price (RM)/Unit	Remarks
Sy Paracetamol (15mg/kg body weight)	5.00/60ml bottle	When needed basis till age 12
Celebrex 200mg bd	4.64/200mg capsule	After age 12, for musculoskeletal pain. When needed basis
Steroid injections for joint osteoarthritis	300/injection	Not more than three injections per joint

[117] The pain experienced due to the bony over-growth is somewhat predictable. P2 is likely to require pain killer medications leading up to the bone resections and shortly after that. He has been undergoing the bone resections once every two years until he reaches the age of 18 to 21. The medicines recommended by Dr Kavitha are not expensive. The plaintiffs proposed that a global sum of *RM5,000* be awarded as the cost of medication for the future. I find that reasonable.

Other assistive devices and services

[118] Dr Kavitha gave a non-exhaustive list of equipment and services which P2 would benefit from in the future. The ultimate aim to be achieved from these recommendations are for: (a) P2 to be as independent as possible; (b) P2's good left arm should be protected from overuse and injury; and (c) P2 should participate in educational and social activities like any other normal person:

No	Items	Estimated Costs (RM)	Estimated Life Span	Number of purchases over multiplier (52 years)	Total (RM)
1	Car modifications for safe one-handed driving (Steering knob with wireless controls for indicator, wiper and horn)	4,000	8 years	8 purchases (4,000x7)	28,000
2	One handed keyboard (For school and work related activities)	3,000	3 yearly	18 purchases (3,000 x 18)	54,000
3	ADL equipment/aids — ergonomic/ pneumatic tools, book holders, toothpaste dispenser, buttonhook, non-slip plates, auto close umbrella, one handed chopping board, etc	1,000	3 years	18 purchases (1,000 x 18)	18,000
4	Home appliances — Washing machine and dryer, dish washer, blender, electric can opener, etc.	8,000	5 years	11 purchases (8,000 x 11)	88,000

5	Part time driver	1,000	Monthly	*Only for the last 15 years of life (1,000 x 12 x 15)	180,000
Grand Total					368,000

Car modification

[119] D agrees with the need of car modification but when P2 is legally able to drive a car (at age of 18 years). And in the first place P2 must have an automatic transmission car equipped with power steering. The actual costs and life span of this item will have to be verified by the relevant vendors, as conceded to by Dr Kavitha. D agrees to the costs of RM4,000 but not to the estimated life span of eight years suggested by Dr Kavitha. D proposed a sum of RM10,800 based on a life span of ten years. This is on the premise that P2's multiplier will be 27 years (ie 45 years minus 18 years). And arrived at as follows:

RM4,000 x (27 years/10 years) = RM10,800

[120] I consider a sum of *RM16,000* to be appropriate. This is calculated based on: (a) costs of RM4,000; (b) estimated life span of ten years; and (c) four purchases over a multiplier of 52 years (commencing from age of 18 years).

One handed keyboard

[121] D agrees that P2 would benefit from the one handed keyboard for typing purpose (computer usage at school and future work) as it would increase speed of typing and reduce his left hand fatigue. The actual costs and life span of this item will have to be verified by the relevant vendors, D agrees to the costs of RM3,000 but not to the estimated life span of three years suggested by Dr Kavitha, D proposed a sum of RM13,500 based on a life span of ten years. Which is calculated as follows:

RM3,000 x (45 years/10 years) = RM13,500

[122] I consider a sum of *RM15,000* to be appropriate. This is calculated based on: (a) costs of RM3,000; (b) estimated life span of ten years and; (c) five purchases over a multiplier of 52 years.

ADL equipment/aids — Ergonomic/pneumatic tools, book holders, toothpaste dispenser, buttonhook, non-slip plates, auto closed umbrella, one handed chopping board etc

[123] D agrees with the need of ADL equipment/aids but not to include book holders, toothpaste dispenser, buttonhook and non-slip plates. The actual costs and life span of these items will have to be verified by the relevant vendors. D submitted that:

(a) P2 can read a book by putting the book on a table. Hence it is not compulsory for him to have the book holder and he might not want to use the book holder at all. This is conceded to by Dr Kavitha;

(b) at his current age, P2 would need his parents' help to dispense the toothpaste onto his toothbrush bristles. But as he grows older he could still use his left hand to perform the action by firstly putting the toothbrush on a sink. It is therefore not compulsory for him to have toothpaste dispenser. The toothpaste dispenser may only be needed for convenient purpose;

(c) when P2 grows older he can be trained to button and unbutton his shirt independently using his left hand. It is much easier to use his own fingers than buttonhook (button aids). It is therefore not compulsory for him to have the buttonhook; and

(d) as to the plates used, it will depend on the types of food P2 would be eating. If he is eating normal Asian food or even spaghetti or pizza, he can use any ordinary plates. The non-slip plates become useful when he wants to spread butter or jams on his bread so that the task would be easier. However, once he is prosthetlcally restored, he can use his right prosthetic arm to stabilise the plate. Hence, he can still use any ordinary plates. It will defeat the purpose when he has been prescribed with a suitable prosthesis but not using it for his functional activity.

[124] D submits that by excluding book holders, toothpaste dispenser, buttonhook and non-slip plates, the reasonable costs would be RM800. D proposed a sum of RM3,600 based on a life span of ten years. Which is calculated as follows:

RM800 x (45 years/10 years) = RM3,600

[125] I consider a sum of *RM4,000* to be appropriate. This is calculated based on: (a) costs of RM800; (b) estimated life span of ten years; and (c) five purchases over a multiplier of 52 years.

Home appliances — Washing machine and dryer, dish washer, blender, electric can opener, etc

[126] D agrees with the need of home appliances but not to include washing machine, dryer, dishwasher and blender. The actual costs and life span of these items have to be verified by the relevant vendors. D submitted that items like washing machine, dryer and blender should not be allowed as they are also common items for everyone to use regardless whether they are able-bodied or disabled. D submits that by excluding washing machine, dryer, blender and dishwasher, the reasonable costs would be RM4,000. D proposed a sum of RM18,000 based on a life span of ten years. Which is calculated as follows:

RM4,000 x (45 years/10 years) = RM18,000

[127] I consider a sum of *RM20,000* to be appropriate. This is calculated based on: (a) costs of RM4,000; (b) estimated life span of ten years; and (c) five purchases over a multiplier of 52 years.

Part-time driver

[128] Dr Kavitha's recommendation of a part time driver for P2 is contingent on him sustaining an overuse injury to his left upper limb. This head of damages is claimed for the last 15 years of P2's life. I did not allow this item, which I find to be speculative and unnecessary. During cross-examination, Dr Kavitha admitted that P2's need for a driver is low. Such is needed only if P2 sustains an overuse injury to his left hand. But such overuse injury would be transient and treatable.

> Q: Now, I'm referring to page 22 of Bundle E, Appendix 3, Part-time Driver. Do you agree, Doctor, the *goal of therapy required would include education regarding proper use of the good upper limb and joint protection technique to prevent development of musculoskeletal symptoms of overuse?*
>
> A: Yes, I would, that's why the items in no 4 and no 5
>
> Q: And do you agree, Doctor, the *goal of therapy required would also include pain management?*
>
> A: Yes, it does
>
> Q: Do you agree, Doctor, the *goal of therapy required would also include maintenance therapy to prevent complications of reduced use such as muscle atrophy and contracture as well as management of overuse injuries?*
>
> A: Yes, I do
>
> Q: Doctor, a very general question. Do you agree that generally an overuse injury may occur if an amputee use the other hand and transfers all function of the losing arm to the remaining hand?

A: Yes, I agree

Q: Do you agree, Doctor, *once a patient is fitted with a prosthetic arm and with proper therapy as perils goal, an overuse injury to the remaining arm could be avoided?*

A: The *risk is definitely reduced*. But for me to say 100% avoided, no, the numbers are still high

Q: So do you agree*, Doctor, an overuse injury to the left upper limb is usually temporary or transient?*

A: *Yes, it's usually temporary.*

Q: Do you agree, Doctor, such an overuse injury can always be treated by doctors such as orthopedic surgeon, rehabilitation physician or any medical doctors?

A: *Yes, most of it can be treated*

Q: So I put it to you, Doctor, there will be *no need for a part-time driver as overuse injury to his left upper limb is usually transient or temporary and can always be treated* by doctors such as orthopedic surgeon, rehabilitation physician or any medical doctors.

A: I will agree that the *need for a driver is low,* it's not high on the list because most injuries*, he would still be able to drive* which is why I've put there it's *only needed if he sustains an overuse injury to his left hand* and I would *expect it to be for a transient period and not a protracted long-term period.*

Q: And therefore, Doctor, I put it to you, H *should be able to drive his car independently.*

A: *That is what we would aim for in rehabilitation, yes*

[129] Once P2 reaches legal age for driving he would require car modifications for safe driving. His therapy would include education regarding proper use of the good upper limb and joint protection techniques to prevent development of musculoskeletal symptoms of overuse. It would also include pain management and maintenance therapy to prevent complications of reduced use such as muscle atrophy and contractures, as well as management of overuse injuries. Once P2 is fitted with a functional prosthetic arm and with proper therapy, an overuse injury to the remaining arm could be avoided and minimised. The evidence shows that any overuse injury to his left upper limb is usually temporary and can always be treated by doctors such as orthopaedic surgeons, rehabilitation physicians or any medical doctors. Hence, P2 should be able to drive his car independently.

Future cost of maids

[130] Dr Kavitha recommended the provision of maids for P2 in the future. The aim of the maid services is to protect P2's one good arm. P2 should avoid overuse of his good left arm so as to decrease the risk of pain and disability from

overuse syndrome. He should not undertake heavy chores which would require a lot of strength and manual dexterity. This would include household chores like mopping and scrubbing the floor, cleaning, washing, gardening, washing the car, etc. Dr Kavitha had given the estimated cost for both a part-time maid (on the basis of four hours, three times a week) and a full-time maid. the plaintiffs propose that P2 should be awarded the cost of a full-time maid only for the last 25 years of his life. For the rest of the period of multiplier, he should be awarded the cost of a part-time maid.

[131] According to the plaintiffs, the above proposal will address the concern of advanced age compounding P2's disability. As a young man, P2 would be able to undertake various ADL on his own, including some of the more complicated ADL with the help of a prosthetic arm. During this period, a part-time maid should be sufficient for him to manage his household. However, as he ages, say from the age of 55 years, P2 will not be as strong and active as he would have been before. The ageing will only make his disability more apparent. He will also need to be careful so as to avoid further injuries at that stage of his life, Therefore, during that period, he should have a full-time maid so as to assist him with various ADL. the plaintiffs request that P2 be awarded the sum of RM924,000 for this item of damages. Which is arrived at as follows:

(a)	cost of full-time maid (for the last 25 years of his life) (RM2,000 pm x 12 months x 25 years)	=	600,000
(b)	cost of part-time maid (for the first 27 years of his multiplier) (RM1,000 pm, x 12 months x 27 years)	=	324,000

[132] D submitted that such future general damages should not be allowed. They led evidence through Dr Izmi that:

(a) P2 only sustained a right transhumeral amputation secondary to right upper limb ischaemia. Clinically he has no cognitive or other neurological impairments. He will be fitted with a functional prosthetic arm. It therefore does not warrant for any maid assistance when he becomes a grown up. P2 is not in a vegetative state that warrants for the help of any special maids;

(b) once P2 is prosthetically restored, he could be trained to perform all of the personal, domestic, instrumental and community of ADL independently; and

(c) even without prosthesis once he is a grown up, P2 could still perform all of the ADL without the assistance of his family or a maid as shown by the Modified Barthel Index Form. The Modified Barthel Index Score is a measure of activities of daily living (at personal domain), which shows

A the degree of independence of a patient from any assistance. The proposed guidelines for interpreting Modified Barthel Index scores are that scores of 024 indicates 'total' dependency, 25–49 indicates 'severe' dependency, 50–74 indicates 'moderate' dependency, 75–90 indicates 'mild' dependency and 91–99 indicates 'minimal' dependency. Score of
B 100 is considered independent. Clinically, the Modified Barthel Index can be administered via interview, by observation of the patient's performance in a specific setting or by asking the patient to demonstrate an activity.

C **[133]** Pertaining to the need for full time or part time maids regarding heavy chores and overuse injury, D offered the following evidence:

(a) the rehabilitation team will train a bodily disabled person to be independent as much as possible. And will want him to be independent
D not just for personal daily activities at home but also outside, studying and working and having a life in future. He or she should be performing well at home independently and also outside;

(b) the rehabilitation team will train people with amputation to smartly use
E their normal hands or their normal upper limb for functioning. And also to use whatever prosthesis that have been prescribed and to pace their activities;

(c) having a maid, we have to justify what scope of jobs that we want the
F amputee individual to actually benefit from;

(d) the rehabilitation team wants people with amputation to be active. At the same time they have to know that certain activities or prolonged activities can cause overuse syndrome;

G (e) the individual needs to understand when is the right time to use or to rest and when is the time to use the equipment or the items safely. The program will teach and educate them; and

(f) not all able-bodied/normal persons will mop floors and do gardening. If
H the individual wants to learn how to perform the task, there will be a training program for that. If the individual wants to learn gardening, there will a rehab centre to cater to that.

I **[134]** It is my finding that this claim has not been proven on a balance of probabilities. I have awarded substantial sums for prosthetic arms (both mechanical and bionic) as well as future therapy and medical needs. The goal of which is to help P2 cope with and become independent despite his disability. To make a further award for future cost of maids, in my view, would be unreasonable or excessive. As regards the touted aim of maid services which is

to protect P2's good arm, it seems to me that therapy and rehabilitation can facilitate that goal. I therefore did not allow this claim, at least not in full.

[135] I note that D's arguments above is premised on the ground that P2 would not require assistance when he becomes a grown up. That once he is a grown up, P2 should be able to perform ADL without the assistance of family members or maids. Going by that argument, I think it would be reasonable to award P2 the cost of maid until he reaches adulthood, say age 18 years. By then P2 would have both bionic and mechanical arm, and should be able to look after himself independently. For this reason, I award the sum of *RM156,000* for this item of damages. Which is arrived at as follows:

Cost of maid (for the next 13 years until P2 reaches age 18 years) (RM1,000 pm x 12 months x 13 years)	=	156,000

Future value of care by family members

[136] The plaintiffs say that even with maids, whether full-time or part-time, P2 will continue to require assistance from family members to undertake various tasks in his day-to-day life. There can also be ADL of a private or sensitive nature, which P2 may feel embarrassed to ask a maid to assist. The plaintiffs submitted that the courts have recognised the value of care given by family members to victims of tort. An award of damages is made for such care, even where a separate award has been made for the cost of maids. They cited the case of *Noorasmawati* where the High Court awarded the sum of RM500 per month as the value of care to be given to the claimant who had lost her right arm. That award was over and above the award of RM2,000 per month made for maids. The plaintiffs request that P2 be awarded the sum of RM500 per month as the value of care to be given by his family members in the future. The total sum claimed under this item is RM312,000. Which is arrived at as follows:

RM500 pm x 12 months x 52 years multiplier = RM312,000

[137] D submitted that this claim should also be rejected since in the first place, with proper training by the rehabilitation team and suitable functional prosthesis, there will be no need for any assistance from others (part-time or full-time maid) when P2 becomes a grown up. Hence, the issue of assistance from family members is a non-starter. D further submitted that no evidence was led during trial that even with maids, P2 will continue to require assistance from family members to undertake various tasks in his day-to-day life and that there can also be ADL of private or sensitive nature, which P2 may feel embarrassed to ask a maid to assist. D contends that this is purely submission from the bar. D points out that for purposes of the trial, no witness statement was prepared for Dr Kavitha. Her evidence was mostly based on her report.

A And nowhere in her report is there any mention of family members' assistance being required to undertake various tasks in his day-to-day life and that there can also be ADL of private or sensitive nature, which P2 may feel embarrassed to ask a maid to assist.

B **[138]** It is my finding that this claim has not been proven on a balance of probabilities. As mentioned earlier, I have awarded substantial sums for prosthetic arms (both mechanical and bionic) as well as future therapy and medical needs. The goal of which is to help P2 cope with and become independent notwithstanding his disability. To make a further award for value C of care by family members, in my view, would be unreasonable or excessive. I therefore did not allow this claim.

Special damages — Cost of maid

D

[139] The parents hired a maid to look after P2 following his discharge from the Penang Hospital in March 2017. P1 was not able to care for him as she was suffering from major depressive syndrome, P2's father had to look after the two older children and manage the household. The maid was employed to look E after P2 exclusively, who required additional care due to his condition and injuries. The need for the maid was as a direct result of the injuries inflicted upon both the plaintiffs. If PI did not sustain injuries to her reproductive organs and their subsequent removal, she probably would not have suffered the psychiatric injuries, which injuries prevented her from caring for P2. The F defence psychiatric expert Dr Siti had noted in her expert opinion that the maid who was hired to care for P2 was of help to P1 and helped her cope with her psychiatric condition.

[140] P1 testified that the family had incurred the initial sum of RM8,500 to G hire the maid. The monthly salary until March 2019 was the sum of RM800. However, from March 2019 onwards it was increased to the sum of RM1,000 per month. the plaintiffs claim the cost of maid for the special damages period of RM20,200 as calculated below:

H (a) from March 2017 to February 2019 (RM800 x 24 months) RM19,200; and

(b) from March 2019 to Jun 2019 (RM1,000 x 4 months) = ?RM1,000

I **[141]** D submitted that this claim should be rejected as P1 has failed to strictly prove such special damages. She failed to substantiate her claim with any contemporaneous documentary evidences. Her allegation was nothing more but a mere bare assertion. D contends that P1's testimony on the issue of maids was self-serving and unsupported by any independent evidence especially from

the maid or the maid agency. P1 failed to call the so-called maid by the name of Suriyani (an Indonesian) or representative from the maid agency to give evidence to corroborate her evidence.

[142] As mentioned earlier, the Court of Appeal case of *Rohgetana* affirmed that special damages, so long as they were pleaded and particularised, could be proved by oral or documentary evidence. Such claim can be allowed so long they were within a reasonable sum and justifiable in the circumstances. I find that to be the case here. I am satisfied that the sum claimed is reasonable and justifiable. I therefore allow this claim. Which I believe should be *RM23,200* calculated as follows:

(a) from March 2017 to February 2019 (RM800 x 24 months) = RM19,200; and

(b) from March 2019 to June 2019 (RM1,000 x 4 months) = RM4,000

Special damages — Value of care by family members

[143] The plaintiffs say that P2 should be awarded the value of care given to him by his parents and other family members. Although during the special damages period, P2 did have a dedicated maid to look after him, the plaintiffs request a nominal monthly sum of RM500. The total sum would therefore be RM18,500, which is arrived at as follows:

RM500 pm x 37 months = RM18,500

[144] I had already allowed RM23,200 for cost of maid during the special damages period as aforesaid. My view is that it would be unreasonable or excessive to also allow value of care by family members on top of that. I therefore did not allow this claim.

Pre-trial damages — Cost of prosthetic arm

[145] I allowed this claim of *RM 9,350* which is not in dispute. Being the cost of the cosmetic (non-functioning) prosthetic arm which was purchased by the parents for P2 in October 2020.

Pre-trial damages — Cost of maids

[146] The pre-trial period is from the date of filing of the action, 26 June 2019 up to the date of decision, 14 March 2022. A period of approximately 33 months.

[147] The parents continued to employ a maid to look after P2 during the pre-trial period. I agree that he certainly requires more care and attention than their other normal children. The monthly sum of RM1,000 which is being incurred should be allowed. I award a sum of *RM33,000*, calculated as follows:

RM1,000 pm x 33 months = RM33,000

Pre-trial damages — Value of care by family members

[148] P2 claims the value of care given to him by his parents during the pre-trial period. He requests a monthly sum of RM500, making a total sum of RM17,000 based 34 months. D objects on the grounds that the value of care given by the parents had never been put as an item under special damages of P2 and it had never been pleaded in the statement of claim. I did not allow this claim as it was not pleaded. I am guided by the Federal Court case of *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 at pp 327–328 which said:

> It is a well-established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved.
>
> ...
>
> The reason that *special damages have* to *be specifically pleaded* is to comply with its object which is to crystallise the issue and to enable both parties to prepare for trial ... In special damages claims the exact loss must be pleaded where the precise amount of item of damages has become clear before the trial either because it has already occurred and so become crystallised or because it can be measured with complete accuracy.

Aggravated damages

[149] The plaintiffs request the sum of RM350,000 for P1 and the sum of RM200,000 for P2 as aggravated damages. My opinion is that aggravated damages are not warranted in the instant case as I find that:

(a) the issue in this suit was purely one of medical negligence. D/Penang Hospital acted as best as they could at a material time to treat and manage the plaintiffs;

(b) although the issue of liability in this suit had been recorded, it was an unintentional negligence. The task of treating patients is placed on the shoulders of doctors on duty and employed at the government hospitals. No doctor would want to intentionally injure his patients. Doctors in government hospitals also have no option to reject patients. All patients referred in government hospitals will be treated accordingly based on the diagnosis at the material time. In this regard, it is noteworthy that P1 was turned away by Pantai Hospital and referred to the Penang Hospital;

(c) there was no exceptional or contumelious behaviour or motive on the part of D/Penang Hospital. There was no element of bad motive or ill conduct on their part when treating the plaintiffs. They had not behaved in a high handed, malicious or oppressive manner toward the plaintiffs;

(d) I take cognisance of the injured feeling of P1 due to a an insensitive remark by a therapist at the Penang Hospital that P2 'is slow, cannot do this, cannot do that'. But the said remark was not such as to warrant an award for aggravated damages; and

(e) based on the overall facts, there were no elements of aggravating features. I believe the plaintiffs have been fairly compensated by way of general and future damages.

[150] The following authorities are instructive. In *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 at p 797, the Court of Appeal said:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or *exacerbated by the exceptional conduct of the defendant*.

[151] The English Court of Appeal in *Thompson v Commissioner of Police of the Metropolis* [1997] 2 All ER 762 laid down the guidance that should be given when assessing on aggravated damages as follows:

(a) compensatory damages are made up of:

  (i) basic damages ie degree of harm suffered by the plaintiff; and

  (ii) aggravated damages. Although not intended to punish the defendant, it will in fact contain a penal element as far as the defendant is concerned.

(b) aggravated damages can be awarded where there are aggravating features that would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to basic damages. The aggravating features include:

  (i) humiliating circumstances;

  (ii) conduct of defendant showing that they behaved in a high handed, malicious or oppressive manner; and

  (iii) the way the litigation or trial is conducted.

(c) the aggravated damages ordinarily should not be as much as twice the basic damages except perhaps where, on the particular facts, the basic

damages are modest. The total figure for basic and aggravated damages should not exceed what is fair compensation.

[152] The plaintiffs complain of delayed admission of guilt on the part of D. The negligent events here occurred in July 2016. The suit was filed in June 2019. Liability was admitted in October 2020, over a year after filing of the suit. I accept that it had never been D's intention to purposely delay the case or to wilfully not admit liability at the initial stage of the suit. D had recorded liability soon after their expert reports were obtained. It is understandable that D could not simply admit liability before studying the medical opinion and getting confirmation from the Ministry.

[153] Next, the plaintiffs allege obstruction and concealment of an internal inquiry report by D. An order for pre-action discovery of the medical records and reports kept in the Penang Hospital was made on 29 May 2017. No internal inquiry report was included in the documents which were disclosed to the plaintiffs.

[154] D argued that the documents prepared for the purpose or in anticipation of litigation, including the internal inquiry report made subsequent to the filing of the suit or the pre-action discovery application, are privileged from disclosure. The internal inquiry report was not made in the ordinary course of treatment. D cited the following authorities.

[155] In *Patch v United Bristol Hospitals Board* [1959] 3 All ER 876, after undergoing a surgical operation in the defendants' hospital, the plaintiff developed gangrene in the area of the operational wound, Soon after the condition was discovered, and before there was any indication that the plaintiff intended to bring legal proceedings against the defendants, the surgeon who had operated and other members of the hospital staff concerned with the care of the plaintiff made written statements, in accordance with the recommendations in a Ministry of Health memorandum. The statements were sent to the defendants' solicitors. The plaintiff subsequently brought an action against the defendants for negligence. The defendants claimed that the statements were privileged from production on the ground that they were made for the purpose of enabling the defendants' solicitors to advise them in reference to anticipated litigation. This claim was resisted by the plaintiff on the ground that the statements were made before there was any suggestion of litigation.

[156] The English High Court held that as the statements were made because something had gone wrong in the course of treatment, and were not made in the ordinary course of treatment, they were made in reasonable anticipation of litigation and, therefore, were privileged from discovery. The court held that

the written statements were not documents which were made in the ordinary course of treatment, but were made simply because something unfortunately had gone wrong, and in order to provide the legal advisers of the hospital with the necessary material to advise, if a claim should be made. The plea of privilege was upheld.

[157] In *Watson v Cammell Laird & Co (Shipbuilders & Engineers) Ltd* [1959] 2 All ER 757, for the purpose of assisting and advising the plaintiff in connexion with a claim for damages for personal injuries, and after the proceedings were clearly contemplated, the plaintiffs solicitors prepared a copy of the case notes made and kept by the hospital which the plaintiff had attended. In the action the defendants applied for disclosure of the copy. It was held by the English Court of Appeal that as the copy of the case notes had been prepared by the solicitors for the purposes of the action, the document was privileged from production.

[158] I agree in principle with D's argument. The plaintiffs submitted that internal inquiry reports are discoverable in law and cited the Federal Court case of *BA Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146 and the High Court case *Nurul Husna*. In both those cases the internal inquiry reports prepared by the hospital management were ordered to be disclosed. But I think those cases are distinguishable.

[159] In *BA Rao*, the appellants' objection was on the ground that the notes and findings of the Committee of Enquiry were unpublished official records and therefore privileged from disclosure under s 123 of the Evidence Act 1950. The said provision protects unpublished official records relating to affairs of state. The Federal Court held that the question of admissibility should be decided by the courts in an enquiry of all available evidence and referred to s 162 of the Evidence Act 1950. It was for the court, not the executive, ultimately to determine that there was a real basis for the claim that 'affairs of state is involved' before it could permit non-disclosure. Unlike *BA Rao*, in the instant case, D's argument is not premised on s 123 of the Evidence Act 1950. Further, there was no enquiry before me on the question of admissibility of the internal inquiry report.

[160] In *Nurul Husna*, the internal inquiry report in question was referred to in para 3 of the defence (see para 5 of the judgment at p 829 (CLJ)). The defendants' objection was likewise on grounds of affairs of state privilege as provided in s 123 of the Evidence Act 1950. Unlike *Nurul Husna*, in the instant case, the internal inquiry report was not pleaded and was not a fact in issue.

[161] I would not venture to make a finding whether there was concealment of the internal inquiry report. The issue or fact pertaining to non-disclosure of

the internal inquiry report was never pleaded in the statement of claim. As such, D will be in no position to state whether: (a) the internal inquiry report was conducted prior to or subsequent to the filing of pre-action discovery application; or (b) that it was in favour of D or otherwise; or (c) that it was for the purpose or in anticipation of litigation. Hence, it was not a fact in issue requiring me to make any finding thereon (see the Federal Court case of *How Paik Too v Mohideen* [1968] 1 MLJ 51; the Supreme Court case of *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428). Moreover, without any internal inquiry report shown to the court, it will be unfair to say that D had hidden documents which were troubling or unhelpful to its case.

[162] Lastly, the plaintiffs complain that P1 was subjected to unfair and insulting questions during cross-examination regarding her claim for loss of earning and her ability to have more children. However, I do not find anything appalling or insulting in the manner the cross-examination was conducted regarding those issues. D followed ordinary and due process of law in attempting to impeach P1 's testimony. There was nothing wrong for D to put questions that the receipts for loss of earnings were fabricated given that the receipts were incomplete and categorised as Part C documents, where both authenticity and contents are disputed. If no challenge was made on the receipts, D would be deemed to admit those documents. The ultimate aim of the line of those cross-examination questions was to suggest that P1 had never been a home tutor and that she was a full-time housewife.

[163] The line of questions regarding P1's ability to have more children was not meant to trivialise the loss of her reproductive organs or to humiliate her. The aim was to mitigate damages in relation to P1's claim for pain and suffering and loss of amenities of life. After all, it was her contention that she wished to have more children but that dream is no longer possible. It is undisputed that all the three children of P1 were delivered via operation ('lower segment caesarean section'). D simply wanted to suggest that it will be risky and medically unsafe for P1 to have more children. To reinforce this point, D pointed out that P1 was offered an elective tubal ligation to prevent further pregnancies.

COSTS

[164] The plaintiffs request the following as regards costs: (a) getting-up fee of RM250,000 for the liability proceedings; (b) getting up fee of RM150,000 for the quantum proceedings; and (c) out-of-pocket expenses of RM49,447.70. Tthe plaintiffs submitted that: (a) medical negligence litigation is expensive; and (b) lead counsel from M/s PS Ranjan & Co were appointed to conduct this matter and they are one of the very few lawyers who undertake medico-legal work.

[165] D proposed costs of RM60,000 based on the following: (a) the case only proceeded on the issue of damages since liability was admitted by D; (b) the agreement on liability lightened the burden of the plaintiffs and their counsel and shortened the days of trial; and (c) there was no complexity nor novel issue in this case as the proceedings only involved the issue of quantum and the plaintiffs only need to prove the quantum claimed.

[166] I considered a global sum of *RM100,000* as costs to be fair and reasonable. Out-of-pocket expenses should be subsumed in this award. I took into account the submissions of the parties and inter alia the following:

(a) O 59 of the Rules of Court 2012, and in particular:

(i) the special matters to be taken into account in exercising discretion described in r 8; and

(ii) the basis of assessment set out in r 16 thereof;

(b) the precedents cited by the parties in their written submissions;

(c) liability was recorded at a case management on 22 October 2020, approximately two months before the trial commenced;

(d) the trial took five days (on 15–17 December 2020, 7 April 2021 and 3 January 2022); and

(e) a total of five witnesses testified in the trial:

(i) three witnesses for the plaintiffs ie Dr Prem (PW1), P1 (PW2) and Dr Kavitha (PW3); and

(ii) two witnesses for D ie Dr Siti (DW1) and Dr Izmi (DW2).

INTEREST

[167] I award interest as follows:

(a) 4%pa on special damages from 1 July 2016 (ie the date of the incident) to 22 October 2020 (ie the date of admission of liability);

(b) 8%pa on general damages and pre-trial damages from 15 July 2019 (ie the date of service of the writ) to 22 October 2020 (ie the date of admission of liability); and

(c) 5%pa on the judgment sum from 22 October 2020 (ie the date of admission of liability) to the date of payment.

CONTROL OF MONEY FOR THE SECOND PLAINTIFF

[168] Pursuant to O 76 r 12 of the Rules of Court 2012, I direct that the money awarded to P2 shall be held in trust jointly by P2's parents for his benefit

until he reaches the age of 18 years. The money shall be deposited in a designated bank account(s) opened in the joint names of both parents and operated jointly by both of them. Proper accounts shall be kept of the maintenance and expenditure of the money.

CONCLUSION

[169] In summary, my decision on quantum of damages is as follows:

No	Item	Court (RM)s
A	P1's claim	
A1	General Damages for pain and suffering and loss of amenities of life	300,000
A2	Future General Damages	5,880
A2.1	Multiplier	28 Life expectancy of 78.9 years, less current age (39 years), and less 30% for contingencies
A3	Special Damages	
A3.1	Travel and incidental expenses	14,300
A3.2	Loss of income	115,200
A3.3	Cost of obtaining pre-action discovery	8,480
A4	Aggravated damages	No award
Total for P1		443,860
B	P2's claim	
B1	General Damages for Pain and Suffering and Loss of Amenities of Life	350,000
B2	Future General Damages	
B2.1	Multiplier	52 Life expectancy of 78.9 years, less current age (5 years), and less 30% for contingencies
B2.2	Cost of Prosthetic Arms (including intensive therapies)	3,950,117
B2.3	Medical and Therapy needs	278,430
B2.4	General Damages for Future Pain and Suffering and Loss of Amenities of Life	No separate award

B2.5	Travel expenses	62,400
B2.6	Medicines	5,000
B2.7	Other Assistive Devices and Services	55,000 (16,000 car, 15,000 keyboard, 4,000 ADL aids, 20,000 home appliances)
B2.8	Cost of Maid	156,000
B2.9	Value of Care by Family Members	No award
B3	Special Damages	
B3.1	Cost of Maid	23,200
B3.2	Value of Care by Family Members	No award
B4	Pre-trial damages	
B4.1	Cost of Prosthetic Arm	9,350
B4.2	Cost of Maid	33,000
B4.3	Value of Care by Family Members	No award
B5	Aggravated damages	No award
Total for P2		4,922,497
Grand Total		5,366,357

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh